SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 344

ATLANTIC COAST LINE RAILROAD COMPANY, APPELLANT,

vs.

STATE OF FLORIDA AND E. S. MATTHEWS, MAMIE EATON-GREENE, AND W. B. DOUGLASS, ETC., ET AL.

No. 345

STATE OF FLORIDA AND E. S. MATTHEWS, MAMIE EATON-GREENE, AND W. B. DOUGLASS, ETC., ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

VOL. I

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[fol. 1]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA

No. 514

MANDATE OF UNITED STATES SUPREME COURT—Filed March 7, 1931

UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the Northern District of Georgia, Greeting:

Whereas, lately in the District Court of the United States for the Northern District of Georgia, before you, or some of you, in a cause between State of Florida and A. S. Wells, E. S. Matthews, and Mamie G. Eaton, as and constituting Florida Railroad Commission, Complainants, and The United States of America and Interstate Commerce Commission, Defendants, Georgia Public Service Commission, et al., Intervenors, in Equity, No. 514, wherein the final decree of the said District Court on rehearing, entered in said cause on the 22nd day of April, A. D. 1929, is in the following words, viz:

"In the above stated case, on petition of complainants to open our former decree entered on January 17th, 1929, denying relief and dismissing the original bill, a rehearing was granted and said decree reopened, and thereupon the Atlantic Coast Line Railroad Company, on its petition, was allowed to intervene in support of the order of the Interstate Commerce Commission of August 2nd, 1928.

The case was submitted for final decree on the reargument and rehearing to a court of three judges, to-wit: Hon. Richard W. Walker, United States Circuit Judge, Hon. Samuel H. Sibley, United States District Judge, and Hon. Benjamin C. Dawkins, United States District Judge.

After hearing argument on the same evidence as at the first hearing, and the Court being fully advised:

It is, for the reasons stated in our opinion of March 22nd, 1929 (which opinion is duly filed as a part of the record), ordered, adjudged and decreed that the original and supplemental bill be and the same hereby is now dismissed and the relief prayed denied.

This April 17th, 1929.

R. W. Walker, United States Circuit Judge. Ben C. Dawkins, United States District Judge. Sam'l H. Sibley, United States District Judge."

as by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme [fol. 2] Court of the United States by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirty, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said District Court, in this cause be, and the same is hereby, reversed, and that the portion of the order of the Inter-State Commerce Commission under review in this Court, with respect to intrastate rates, be set aside.

And it is further ordered that this cause be, and the same is hereby, remanded to the District Court of the United States for the Northern District of Georgia for further proceedings in conformity with the opinion of this Court.

January 5, 1931.

You, therefore, are hereby commanded that such further proceedings be had in such cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles E. Hughes, Chief Justice of the United States, the thirteenth day of February, in the year of our Lord one thousand nine hundred and thirty-one.

Charles Elmore Cropley, Clerk of the Supreme Court of the U. S.

A true, correct and complete copy of the original.
Jul. 23, 1934.
C. A. McGrew, Deputy Clerk. (Seal U. S. District Court, Northern District of Georgia.)

[fol. 3] [File endorsement omitted.]

[fol. 4] IN THE UNITED STATES DISTRICT COURT

No. 511

MANDATE OF UNITED STATES SUPREME COURT—Filed March 7, 1931

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the Northern District of Georgia, Greeting:

Whereas, lately in the District Court of the United States for the Northern District of Georgia, before you, or some of you, in a cause between Brooks-Scanlon Corporation, Wilson Cypress Company, and Cummer Cypress Company, Complainants, and The United States of America and Interstate Commerce Commission, Defendants, Georgia Public Service Commission, et al., Intervenors, In Equity, No. 511, wherein the final decree of the said District Court on rehearing, entered in said cause on the 22nd day of April, A. D. 1929, is in the following words, viz:

"In the above case, on petition of Complainants to open our former decree entered on January 17th, 1929, denying relief and dismissing the original bill, a rehearing was granted and said decree reopened, and thereupon the Atlantic Coast Line Railroad Company, on its petition, was allowed to intervene in support of the order of the Interstate Commerce Commission of August 2nd, 1928.

The case was submitted for final decree on the reargument and rehearing, to a court of three judges, to-wit: Hon. Richard W. Walker, United States Circuit Judge, Hon.

Samuel H. Sibley, United States District Judge, and Hon. Benjamin C. Dawkins, United States District Judge.

After hearing argument on the same evidence as at the first hearing, and the Court being fully advised:

It is, for the reasons stated in our opinion of March 22nd, 1929 (which opinion is duly filed as a part of the record), ordered, adjudged and decreed that the original and supplemental bill be and the same hereby is now dismissed and the relief prayed denied.

[fol. 5] This 17th day of April, 1929.

R. W. Walker, United States Circuit Judge; Ben C. Dawkins, United States District Judge; Sam'l H. Sibley, United States District Judge."

as by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeable to the act of Congress, in such case made and provided, fully and at large appears.

[fol. 6] And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirty, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, reversed, and that the portion of the order of the Interstate Commerce Commission under review in this Court, with respect to intrastate rates, be set aside.

And it is further ordered that this cause be, and the same is hereby, remanded to the District Court of the United States for the Northern District of Georgia for further proceedings in conformity with the opinion of this Court.

January 5, 1931.

[fol. 7] You, therefore, are hereby commanded that such further proceedings be had in such cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles E. Hughes, Chief Justice of the United States, the thirteenth day of February, in the

year of our Lord one thousand nine hundred and thirty-one.
Charles Elmore Cropley, Clerk of the Supreme Court of the United States.

[File endorsement omitted.]

[fol. 8] IN UNITED STATES DISTRICT COURT

No. 512

MANDATE OF UNITED STATES SUPREME COURT—Filed March 7, 1931

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the Northern District of Georgia, Greeting:

Whereas, lately in the District Court of the United States for the Northern District of Georgia, before you, or some of you, in a cause between The Wilson Lumber Company of Florida, Complainant, and The United States of America and Interstate Commerce Commission, Defendants, Georgia Public Service Commission, et al., Intervenors, In Equity, No. 512, wherein the final decree of the said District Court on rehearing, entered in said cause on the 22nd day of April, A. D. 1929, is in the following words, viz:

"In the above stated case, on petition of complainants to open our former decree entered on January 17th, 1929, denying relief and dismissing the original bill, a rehearing was granted and said decree reopened, and thereupon the Atlantic Coast Line Railroad Company, on its petition, was allowed to intervene in support of the order of the Interstate Commerce Commission of August 2nd, 1928.

The case was submitted for final decree on the reargument and rehearing, to a court of three judges, to-wit: Hon. Richard W. Walker, United States Circuit Judge, Hon. Samuel H. Sibley, United States District Judge, and Hon. Benjamin C. Dawkins, United States District Judge.

After hearing argument on the same evidence as at the first hearing, and the Court being fully advised:

It is, for the reasons stated in our opinion of March 22nd, 1929 (which opinion is duly filed as a part of the record), [fol. 9] ordered, adjudged and decreed that the original and supplemental bill be and the same hereby is now dismissed and the relief prayed denied.

This April 17th, 1929.

R. W. Walker, United States Circuit Judge. Ben. C. Dawkins, United States District Judge. Sam'l H. Sibley, United States District Judge."

as by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

[fol. 10] And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirty, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, reversed, and that the portion of the order of the Interstate Commerce Commission under review in this Court, with respect to intrastate rates, be set aside.

And it is further ordered that this cause be, and the same is hereby, remanded to the District Court of the United States for the Northern District of Georgia for further proceedings in conformity with the opinion of this Court.

January 5, 1931.

[fol. 11] You, therefore, are hereby commanded that such further proceedings be had in such cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles E. Hughes, Chief Justice of the United States, the thirteenth day of February, in the year of our Lord one thousand nine hundred and thirty-one.

Charles Elmore Cropley, Clerk of the Supreme Court of the United States.

[File endorsement omitted.]

[fol. 12] IN UNITED STATES DISTRICT COURT

No. 511

BROOKS-SCANLON CORPORATION, WILSON CYPRESS COMPANY, CUMMER CYPRESS COMPANY, Complainants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., Defendants

MOTION FOR DECREE IN ACCORDANCE WITH THE MANDATE AND FOR ORDER OF RESTITUTION—Filed Feb. 28, 1931

To the Honorable Judges of the District Court of the United States in and for the Northern District of Georgia:

I

Comes now the complainants, Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company, by their undersigned solicitors, and hereby move the Court to enter a decree in conformity with the mandate of the Supreme Court of the United States, dated February 13th, 1931, and filed February 19th, 1931, and in and by said decree to order, adjudge and decree:

[fol. 13] (a) That the decree of this Court entered herein on the 22nd day of April, 1929, dismissing the original and supplemental bills of complaint herein and denying the relief prayed be vacated, set aside and annulled; and

(b) That all parts of the order of the Interstate Commerce Commission entered by said Commission on the 2nd day of August, 1928, and as thereafter amended and clarified and purporting to become effective February 8, 1929, in the proceedings before said Commission entitled, "Georgia Public Service Commission versus Atlantic Coast Line Railroad Company", numbered 18364 on the Docket of said Commission, which prescribed or attempted to prescribe rates for the transportation of logs of any descriptions in intrastate commerce in the State of Florida, on the lines of the said Atlantic Coast Line Railroad Company in said State or required or attempted to require the said Railroad Company to establish, put in force, and

maintain the rates so prescribed for the transportation of logs of any descriptions in intrastate commerce in the State of Florida, be enjoined, set aside and annulled in whole, and that the defendants, the United States of America and Interstate Commerce Commission, and the intervenors, Georgia Public Service Commission and the Atlantic Coast Line Railroad Company, the successors, officers, agents, employees and servants of each of said parties, and all other persons, be perpetually restrained [fol. 14] and enjoined from commencing or prosecuting any suit, prosecution or proceeding in any Court of Law or Equity to enforce or attempt to enforce the part, or any of the parts, of said order enjoined, set aside and annulled by said decree.

II

The complainants further move the Court to render a decree against the intervenor and defendant, Atlantic Coast Line Railroad Company, to restore to the respective complainants the amounts paid by said complainants to said intervenor and defendant because of the erroneous decrees heretofore entered by this Court herein. Complainants in support of this portion of said motion aver that because of the dismissal of this cause by this Court as aforesaid of their bill of complaint and supplemental bill of complaint herein instead of a decree as prayed in complainants' said bill of complaint and supplemental bill of complaint herein, setting aside and annulling and enjoining the enforcement of such part or parts of the order of August 2nd, 1928, of the Interstate Commerce Commission as amended and clarified in its Docket No. 18364 as are prayed in and by said bill of complaint and supplemental bill of complaint to be set aside and annulled and enjoined as aforesaid, complainants were compelled to pay and did pay to the said Atlantic Coast Line Railroad Company, from the effective date of said order of the Interstate [fol. 15] Commerce Commission, as amended and clarified as aforesaid, to-wit, February 8, 1929, for the transportation of logs, except walnut, cherry, and cedar, and except ash, gum, hickory, oak, pine and cypress logs not over six feet in length, in carloads, in intrastate commerce within the State of Florida over the lines of said intervenor and defendant, Atlantic Coast Line Railroad Company, for distances not exceeding 170 miles, the rates so prescribed by

the said unlawful and invalid order of the Interstate Commerce Commission, as amended and clarified as aforesaid. That the said rates so paid as aforesaid by the complainants to said intervenor and defendant, were in excess of the lawful state rates for such transportation of such logs assailed in said proceedings before said Interstate Commerce Commission, viz., the scale of State rates which were established and maintained in intrastate commerce subject to the authority of the State of Florida, and published as required by its laws and which were in force and effect for the transportation of such logs in intrastate commerce in Florida when such invalid and unlawful order of the Interstate Commerce Commission became effective and which the said invalid and unlawful order purported to supersede. If this Court had entered in the first instance the decree which the Supreme Court of the United States has adjudged this Court should have entered, the complainants would have paid to the said intervenor and defendant for such transportation of such logs in such intrastate [fol. 16] commerce only said lawful State rates, and said intervenor and defendant has accordingly therefore benefited from the erroneous decree of this Court, in the amount and to the extent that the transportation charges for such transportation of such logs so paid by complainants are aforesaid, exceeded the transportation charges lawfully payable for such transportation of such logs computed upon and determined by said lawful State rates. And so it is that said complainants have been subjected to and compelled by said decrees of this Court to pay overcharges in the amount of large sums of money charged, demanded, collected and received by said intervenor and defendant as aforesaid, and the complainants aver that they are now entitled to restitution of said overcharges together with interest thereon at the legal rate in Florida from the respective dates of the payment of said overcharges. That the legal rate of interest in the State of Florida is eight per cent per annum and that the payment of all such overcharges has been made in said State. And the complainants move the Court to make and enter a decree adjudging and decreeing that they are respectively entitled to restitution of all such overcharges so paid by them to the Atlantic Coast Line Railroad Company, as aforesaid, together with interest thereon at the legal rate in Florida from and after the respective dates of the payment of all such overcharges as aforesaid.

[fol. 17] III

That the aggregate amounts of said overcharges heretofore paid as aforesaid by the complainants respectively, are as follows:

The complainant, Brooks-Scanlon Corporation, approximately the sum of $5,900.00.

The complainant, Wilson Cypress Company, approximately the sum of $153,000.00.

The complainant, Cummer Cypress Company, approximately the sum of $48,500.00.

That because said complainants will or may be compelled to so pay other of such overcharges prior to the entering of the decree herein sought to be entered, the full and exact amount of said overcharges and the restitution due the several complainants from said defendant and intervenor, is not and cannot now be known, and is not and cannot be ascertained without an accounting and until after the termination of such overcharges following the entering of the decree herein sought to be entered. And complainants further move the Court for an order of reference to a Master for the ascertainment of the amount of restitution properly to be made by said Atlantic Coast Line Railroad Company to the several complainants.

IV

The complainants further move the Court to retain juris-
[fol. 18] diction of this cause and of the parties hereto, to the end that such other and further proceedings may be had, and such other and further orders and decrees may be entered with respect to restitution, costs and any and all other proper matters as are according to right and justice and the laws of the United States.

Dated at Jacksonville, Fla., this February 26th, A. D. 1931.

Henry P. Adair, August G. Gutheim, Geo. L. Rutherford, E. W. Mitchell, H. P. Osborne, Chas. E. Cotterill, C. G. Ashby, Solicitors for Complainants.

[fol. 19] *Duly sworn to by H. P. Adair. Jurat omitted in printing.*

[fol. 20] Allowed and ordered filed, February 27th, 1931.
Wm. H. Barrett, U. S. Judge.

[File endorsement omitted.]

[fol. 21] IN UNITED STATES DISTRICT COURT

No. 512

WILSON LUMBER COMPANY OF FLORIDA, Complainant,

vs.

UNITED STATES OF AMERICA, ET AL., Defendants

MOTION FOR DECREE IN ACCORDANCE WITH THE MANDATE AND FOR ORDER OF RESTITUTION—Filed March 2, 1931

To the Honorable Judges of the District Court of the United States in and for the Northern District of Georgia:

I

Comes now the complainant, Wilson Lumber Company of Florida, by its undersigned solicitors, and hereby moves the Court to enter a decree in conformity with the mandate of the Supreme Court of the United States, dated February 17th, 1931, and filed February —, 1931, and in and by said decree to order, adjudge and decree:

(a) That the decree of this Court entered herein on the 17th day of April, 1929, dismissing the original and supplemental bills of complaint herein and denying the relief prayed be vacated, set aside and annulled; and

(b) That such part or parts of the order of the Interstate Commerce Commission entered by it on the 2nd day of August, 1929, as thereafter amended and clarified by the said Commission, in the proceeding before it entitled: [fol. 22] Georgia Public Service Commission v. Atlantic Coast Line Railroad Company, numbered 18364 on its docket, as required or attempted to require the Atlantic Coast Line Railroad to establish, put in force and maintain rates for the transportation of logs, except walnut, cherry,

and cedar, in car loads, in intrastate traffic within and throughout the entire State of Florida, without exception, which shall be the same as those prescribed in said order of August 2d, 1928, by said Interstate Commerce Commission, in a preceding paragraph thereof, as reasonable for transportation in interstate commerce north bound for certain designated points in the State of Florida to destinations in the State of Georgia, be enjoined, set aside, and annulled in whole, and that the said defendants, United States of America and Interstate Commerce Commission, and the said defendants and intervenors, Georgia Public Service Commission and Atlantic Coast Line Railroad Company, the successors, officers, agents, employees and servants of each of said parties, and all other persons, be perpetually restrained and enjoined from commencing or prosecuting any suit, prosecution or proceeding in any Court of Law or Equity to enforce or attempt to enforce the part, or any of the parts, of said order enjoined, set aside and annulled by said decree.

II

Complainant further moves the Court to render a decree against the intervenor and defendant, Atlantic Coast Line Railroad Company, to restore to complainant the amounts paid by it to said intervenor and defendant because of the erroneous decrees heretofore entered by this Court herein. [fol. 23] Complainant in support of this portion of said motion avers that because of the dismissal of this cause by this Court as aforesaid of its bill of complaint and supplemental bill of complaint herein instead of a decree as prayed in complainants' said bill of complaint and supplemental bill of complainant herein, setting aside and annulling and enjoining the enforcement of such part or parts of the order of August 2nd, 1928, of the Interstate Commerce Commission as amended and clarified in its Docket No. 18364 as are prayed in and by said bill of complaint and supplemental bill of complaint to be set aside and annulled and enjoined as aforesaid, complainant was compelled to pay and did pay to the said Atlantic Coast Line Railroad Company, from the effective date of said order of the Interstate Commerce Commission, as amended and clarified as aforesaid, to-wit, February 8, 1929, for the transportation of logs, except walnut, cherry and cedar,

and except ash, gum, hickory, oak, pine and cypress logs not over six feet in length, in intrastate commerce within the State of Florida over the lines of said intervenor and defendant, Atlantic Coast Line Railroad Company, for distances not exceeding 170 miles, the rates so prescribed by the said unlawful and invalid order of the Interstate Commerce Commission, as amended and clarified as aforesaid. That the said rates so paid as aforesaid by the complainant to said intervenor and defendant, were in excess of the lawful state rates for such transportation of such logs, viz., the scale of State rates which were established and maintained in intrastate commerce subject to the authority of the State of Florida, and published as required by its laws and which were in force and effect for the transportation of such logs in intrastate commerce in Florida when such invalid and unlawful order of the Interstate Commerce Commission became effective and which the said invalid and unlawful order purported to super-
[fol. 24] sede. If this Court had entered in the first instance the decree which the Supreme Court of the United States has adjudged this Court should have entered, this complainant woud have paid to the said intervenor and defendant for such transportation of such logs in such intrastate commerce only said lawful State rates, and said intervenor and defendant has accordingly therefore benefited from the erroneous decrees of this Court, in the amount and to the extent that the transportation charges for such transportation of such logs so paid by complainant as aforesaid, exceeded the transportation charges lawfully payable for such transportation of such logs computed upon and established by said lawful State rates. And so it is that complianant has been subjected to and compelled by said decrees of this Court to pay overcharges in the amount of large sums of money charged, demanded, collected and received by said intervenor and defendant as aforesaid, and complainant avers that it is now entitled to restitution of said overcharges together with interest thereon at the legal rate in Florida from the respective dates of the payment of such overcharges. That the legal rate of interest in the State of Florida is eight per cent per annum and that the payment of all such overcharges has been made in said State. And complainant moves the court to make and enter a decree adjudging and decreeing that

it is entitled to restitution of all such overcharges so paid by it to the Atlantic Coast Line Railroad Company, as aforesaid, together with interest thereon at the legal rate in Florida from and after the respective dates of the payment of all such overcharges as aforesaid.

III

That the amount of said overcharges, heretofore paid by [fol. 25] the complainant, is approximately the sum of Forty Thousand Dollars ($40,000.00); that because said complainant will or may be compelled to so pay other of such overcharges prior to the entering of the decree herein sought to be entered, the full and exact amount of said overcharges and of the restitution due complainant from said defendant and intervenor, is not and cannot now be known, and is not and cannot be ascertained without an accounting and until after the termination of such overcharges following the entering of the decree herein sought to be entered. And complainant further moves the Court for an order of reference to a Master for the ascertainment of the amount of restitution properly to be made by said Atlantic Coast Line Railroad Company to the several complainants.

IV

Complainant moves the Court to make and enter such further order and proceedings, in conformity with the opinion and decree of the Supreme Court, as according to right and justice and the laws of the United States ought to be had.

Dated at Louisville, Kentucky, February 28th, A. D. 1931.

J. F. Norman, Norman, Quirk & Graham, Solicitors for Complainant.

[fol. 26] [File endorsement omitted.]

[fol. 27] IN UNITED STATES DISTRICT COURT

No. 514

STATE OF FLORIDA, and A. S. WELLS, E. S. MATHEWS, and Mamie G. Eaton, as and Constituting Florida Railroad Commission, complainants,

versus

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al., Defendants

MOTION FOR DECREE IN ACCORDANCE WITH THE MANDATE AND FOR ORDER OF RESTITUTION—Filed Feb. 28, 1931.

To the Honorable Judges of the District Court of the United States, in and for the Northern District of Georgia, Atlanta Division:

I

Come now the complainants, the State of Florida, by Fred H. Davis, its Attorney General, and A. S. Wells, E. S. Mathews, and Mamie G. Eaton, as and constituting Florida Railroad Commission, by T. T. Turnbull, Special Counsel for Florida Railroad Commission, and Solicitor for complainants, and hereby move the Court to enter a decree in conformity with the mandate of the Supreme Court of the United States dated February 13th, A. D. 1931, and filed February 19th, A. D. 1931, and in and by said decree to order, adjudge and decree:

[fol. 28] (a). That the decree of this Court entered herein on the 22nd day of April, 1929, dismissing the original and supplemental bills of complaint herein and denying the relief prayed be vacated, set aside and annulled; and

(b). That all parts of the order of the Interstate Commerce Commission entered by said Commission on the 2nd day of August, 1928, and as thereafter amended and clarified and purporting to become effective February 8, 1929, in the proceedings before said Commission entitled, "Georgia Public Service Commission versus Atlantic Coast Line Railroad Company," numbered 18364 on the Docket of said Commission, which prescribed or attempted

to prescribe rates for the transportation of logs of any description in intrastate commerce in the State of Florida, on the lines of the said Atlantic Coast Line Railroad Company in said State or required or attempted to require the said Railroad Company to establish, put in force, and maintain the rates so prescribed for the transportation of logs of any description in intrastate commerce in the State of Florida, be enjoined, set aside, and annulled in whole, and that the defendants, the United States of America and Interstate Commerce Commission, and the intervenors, Georgia Public Service Commission and the Atlantic Coast Line Railroad Company, the successors, officers, agents, employees and servants of each of said parties, and all other persons, be perpetually restrained and enjoined from commencing or prosecuting any suit, prosecution or proceeding in any Court of Law or Equity to enforce or attempt to enforce the part, or any of the parts, of said order enjoined, set aside and annulled by said decree.

[fol. 29] II

The complainants further move the Court to render a decree against the intervenor and defendant, Atlantic Coast Line Railroad Company, to restore to all shippers and consignees respectively in the State of Florida the amounts paid by them respectively to said intervenor and defendant because of the erroneous decrees heretofore entered by this Court herein. Complainants in support of this portion of said motion aver that because of the dismissal of this cause by this Court as aforesaid of their bill of complaint and supplemental bill of complaint herein instead of a decree as prayed in complainants' said bill of complaint and supplemental bill of complaint herein, setting aside and annulling and enjoining the enforcement of such part or parts of the order of August 2nd, 1928, of the Interstate Commerce Commission as amended and clarified in its Docket No. 18364, as are prayed in and by said bill of complaint and supplemental bill of complaint to be set aside and annulled and enjoined as aforesaid, divers shippers and consignees respectively in Florida were compelled to pay and did pay to the said Atlantic Coast Line Railroad Company, from the effective date of said order of the Interstate Commerce Commission, as amended and clarified as aforesaid, to-wit, February 8, 1929, for the transportation of logs, except

walnut, cherry and cedar, and except ash, gum, hickory, oak, pine and cypress logs not over six feet in length, in carloads, in intrastate commerce within the State of Florida over the lines of said intervenor and defendant, Atlantic Coast Line Railroad Company, for distances not exceeding 170 miles, the rates so prescribed by the said unlawful and invalid order of the Interstate Commerce Commission, as amended and clarified as aforesaid. That the said rates so paid as aforesaid by such shippers and [fol. 30] consignees respectively to said intervenor and defendant, were in excess of the lawful state rates for such transportation of such logs assailed in said proceedings before the said Interstate Commerce Commission, viz., the scale of State rates which were established and maintained in intrastate commerce subject to the authority of the State of Florida, and published as required by its laws and which were in force and effect for the transportation of such logs in intrastate commerce in Florida when such invalid and unlawful order of the Interstate Commerce Commission became effective and which the said invalid and unlawful order purported to supersede. If this Court had entered in the first instance the decree which the Supreme Court of the United States has adjudged this Court should have entered, such shippers and consignees respectively would have paid to the said intervenor and defendant for such transportation of such logs in such intrastate commerce only said lawful State rates, and said intervenor and defendant has accordingly therefore benefited from the erroneous decrees of this Court, in the amounts and to the extent that the transportation charges for such transportation of such logs so paid by such shippers and consignees respectively, as aforesaid, exceeded the transportation charges lawfully payable for such transportation of such logs computed upon and determined by said lawful State rates. And so it is that such shippers and consignees respectively have been subjected to and compelled by said decrees of this Court to pay overcharges in the amount of large sums of money charged, demanded, collected and received by said intervenor and defendant as aforesaid, and the complainants aver that all such shippers and consignees respectively, are now entitled to restitution of said overcharges together with interest thereon at the legal rate in

Florida from the respective dates of the payment of such overcharges. That the legal rate of interest in the State of [fol. 31] Florida is eight per cent per annum and that the payment of all such overcharges has been made in said State. And the complainants move the Court to make and enter a decree adjudging and decreeing that all such shippers and consignees respectively are entitled to restitution of all such overcharges so paid by them to the Atlantic Coast Line Railroad Company, as aforesaid, together with interest thereon at the legal rate in Florida from and and after the respective dates of the payment of all such overcharges as aforesaid.

III

That among such shippers and consignees who have been compelled to pay and who have paid, as aforesaid, such overcharges as aforesaid, are the persons and corporations whose names are hereinafter set forth and the approximate amount of such overcharges so paid by them as aforesaid, are as follows:

Eugene Stacy	$408.51
Hazzard Brothers	459.25
F. S. Buffum & Company	1,345.28
Gress Manufacturing Company	208.24
Thompson-Katz Lumber Company	5,214.36
Wilson Otwell Lumber Corporation	156.27
Hessler Hardwood Company	902.11

And the complainants aver that there are persons who have been compelled to pay and who have paid such overcharges as aforesaid whose names are unknown to the complainants, since the time that the said unlawful and invalid order of the Interstate Commerce Commission purported to become effective, as aforesaid, and that the full amount of such overcharges and the restitution due such shippers and consignees respectively from the said defendant and intervenor is not and cannot now be known and is not and cannot [fol. 32] be ascertained without an accounting and until after the termination of such overcharges following the entry of the decree herein sought to be entered. That the complainants have been requested by some of such known shippers and consignees to compel restitution, as herein set

forth, and will hereafter be requested to compel restitution by others of such persons, and it is the duty of the complainants under the laws of Florida to compel such restitution to all such shippers and consignees respectively in these proceedings. And the complainants further move the Court for an order of reference to a Master for the ascertainment of the amounts of restitution properly to be made by said Atlantic Coast Line Railroad Company to said persons respectively, and move the Court in and by said order of reference to authorize said Master for the purpose of ascertaining the names and addresses of said persons and the amount of said overcharges to examine witnesses, administer oaths and call upon said defendant and intervenor, Atlantic Coast Line Railroad Company for, and require said, defendant and intervenor to produce any books, papers, records and accounts, or transcripts thereof, which in his opinion are necessary for the purpose of enabling him to determine any facts in issue in connection with any claim for such restitution filed with him, and further in and by said order of reference to direct said Master to give notice by publication in such newspapers published in the State of Florida and at such time or times as the Court shall in and by its order of reference direct, to the effect that all persons having any claims against the said intervenor and defendant, Atlantic Coast Line Railroad Company, for such restitution shall present the same to said Master within such time as this Court shall fix in and by said order of reference.

[fol. 33] IV

The complainants further move the Court to retain jurisdiction of this cause and of the parties hereto, to the end that such other and further proceedings may be had, and such other and further orders and decrees may be entered with respect to restitution, costs and any and all other proper matters as are according to right and justice and the laws of the United States.

Dated at Jacksonville, Florida, this February 26th, A. D. 1931.

Fred H. Davis, Attorney General, State of Florida.
Theo. T. Turnbull, Special Counsel for Florida Railroad Commission, Solicitor for Complainants.

[fol. 34] *Duly sworn to by Fred H. Davis. Jurat omitted in printing.*

[fol. 35] Allowed and ordered filed, February 27th, 1931.
Wm. H. Barrett, U. S. Judge.

[File endorsement omitted.]

[fol. 36] In United States District Court

No. 514

[Title omitted]

Amendment to the Complainants' Motion for Decree in Accordance with the Mandate and for Order of Restitution—Filed March 7, 1931

Come now the complainants in the above entitled cause and amend their motion for a decree in accordance with the mandate and for an order of restitution, by adding thereto next following paragraph II thereof a new paragraph number Paragraph II-A, as follows:

II-A

That to wit, on March 5, A. D. 1931, the said Florida Railroad Commissioners, in session at their office in the City of Tallahassee, Florida, did lawfully make and enter a certain order respecting intrastate rates on logs, to-wit, order number 1032, and a copy of said order is hereto attached and made a part hereof. That the said order was entered after due notice and opportunity afforded to the Atlantic Coast Line Railroad Company to be heard thereon, and upon the matters and things set forth therein.

Fred H. Davis, T. T. Turnbull, Solicitors and Counsel for Complainants.

Allowed, subject to objections, March 7th, 1931.

—— ——, Judge.

[fol. 37] BEFORE THE RAILROAD COMMISSION OF THE STATE OF FLORIDA

Order No. —

In re Intrastate Rates on Logs of Certain Descriptions

This matter came on this day for further consideration, and it appearing to this Commission and this Commission finding that the Interstate Commerce Commission, in its Docket No. 18364, by its order dated August 2, 1928, and thereafter amended, clarified and supplemented, did order the Atlantic Coast Line Railroad Company on and after February 8, 1929, to apply between points on its lines within and throughout the State of Florida, without exception, a distance scale of commodity rates set forth in its said order of August 2, 1928, for the transportation intrastate in Florida of logs, except walnut, cherry and cedar, and except ash, gum, hickory, oak, pine and cypress logs not over six feet in length;

And it further appearing to this Commission and this Commission finding that the purpose of the said order of said Interstate Commerce Commission, as amended, clarified and supplemented, as aforesaid, insofar as the same purported to affect intrastate rates by exercise of Federal power, was to supersede (except as to walnut and cherry logs) with the rates so prescribed by it, the distance scale of commodity rates many years prior thereto filed with this Commission, and published as required by the Laws of the State of Florida, and approved and adopted by this Commission in the manner prescribed by law and by the rules of this Commission, and thenceforward maintained and in force and effect subject to the authority of the State of Florida between all stations on the line of said railroad company for the transportation in intrastate commerce in Florida for distance not exceeding 170 miles of logs, carload, except cedar logs, per car of 50,000 pounds, excess in proportion, the same having been published in divers earlier tariffs and also published in Agent Glenn's I. C. C. A. 659 effective June 15, 1928, page 413, and brought forward in Supplement 9, page 12, effective October 10, 1928, and being sometimes hereinafter referred to as the "Cummer Scale."

[fol. 38] And it further appearing to this Commission and

this Commission finding that this Commission deeming that the order of the said Interstate Commerce Commission was unlawful and invalid insofar as the same attempted to prescribe intrastate rates for the transportation of logs, as aforesaid, between points in Florida, this Commission prior to the effective date of said order, in the name of the State of Florida, and in the name of this Commission and the members thereof, did file in the United States District Court for the Northern District of Georgia, Atlanta Division, a suit in equity against the United States of America, praying that said order of the Interstate Commerce Commission be enjoined, annulled and set aside insofar as the said order attempted to affect intrastate rates between points in Florida.

And it further appearing to this Commission and this Commission finding that after divers proceedings in said United States District Court, including interventions by the said Interstate Commerce Commission, the Georgia Public Service Commission, and the said Atlantic Coast Line Railroad Company, and hearing and rehearing, the said United States District Court did enter its final decree wherein and whereby it denied the relief prayed by the original bill, and the supplemental bill of the State of Florida, and of this Commission, for the reasons stated in the opinion and decision of said Court filed with said decree did declare that the said order of the said Interstate Commerce Commission was valid, and did dismiss said original bill and supplemental bill of the State of Florida and of the said Railroad Commissioners of Florida.

[fol. 39] And it further appearing to this Commission and this Commission finding that upon the coming down of the decision, opinion and decree of the said United States District Court this Commission deeming that the said decision, opinion and decree were erroneous, did determine to appeal therefrom to the Supreme Court of the United States, to the end that said order of the said Interstate Commerce Commission, as amended and clarified, as aforesaid, should be set aside, to the extent aforesaid, and thereafter in due course did perfect and prosecute such appeal to the end that to-wit, on January 5, 1931, the said Supreme Court of the United States by its decision, opinion and decree did adjudge that the said order of the Interstate Commerce Commission was unlawful and invalid, and did order, ad-

judge and decree that the said decree of said United States District Court be and the same was thereby reversed, and that said order of the Interstate Commerce Commission be set aside insofar as the same attempted to prescribe intrastate rates for the transportation of such logs between points in Florida, and that said cause be, and the same was thereby remanded to said United States District Court for further proceedings in conformity with the opinion of said Supreme Court of the United States.

And it further appearing to this Commission and this Commission finding that the mandate of said Supreme Court of the United States has been sent down to and filed in the said United States District Court, transmitting to the said United States District Court the decision, opinion and decree of said Supreme Court of the United States and commanding the said District Court that such further proceedings be had in said cause in conformity with the decision, opinion and decree of said Supreme Court of the United States as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

[fol. 40] And it further appearing to this Commission, and this Commission finding that proceedings are now about to be had in said United States District Court vacating the erroneous decree so reversed by said Supreme Court of the United States, and setting aside the said unlawful order of the said Interstate Commerce Commission to the extent aforesaid, and otherwise carrying out the mandate of the said Supreme Court of the United States.

And it further appearing to this Commission, and this Commission finding that the said distance scale of commodity rates for the transportation of logs, except cedar logs between points in Florida, which is described in the said opinion of the said Supreme Court of the United States as the "Cummer Scale," long prior to February 8, 1929, was published as required by the laws of the State of Florida, and thenceforward and thereafter was maintained in intrastate commerce in Florida subject to the authority of the State of Florida, and that the said Atlantic Coast Line Railroad Company at no time has applied to this Commission to advance or increase or modify said scale of rates, and that this Commission has never approved or consented to any advance or increase or modification thereof,

and that said distance scale of commodity rates, viz., said "Cummer Scale," on and at all times since February 8, 1929, has been and still is in force and effect upon the lines of the said Atlantic Coast Line Railroad Company in the State of Florida and applicable between all stations on such lines within and throughout the State of Florida, without exception, notwithstanding the said unlawful and invalid order of the Interstate Commerce Commission and notwithstanding the said erroneous decree of the said United States District Court, and this Commission at no time and in no way has suffered or permitted the said distance scale of commodity rates prescribed by the said invalid and unlawful order of the Interstate Commerce Commission to be applied by the said Atlantic Coast Line Railroad Company in intrastate commerce in Florida, or abstained from the enforcement of the application of the said "Cummer Scale," in such intrastate commerce, except during the [fol. 41] period and to the extent that this Commission has been compelled so to do by the erroneous decrees of the said United States District Court for the Northern District of Georgia, Atlanta Division, in said suit.

And it further appearing to this Commission and this Commission finding that the said Atlantic Coast Line Railroad Company on and after and ever since February 8, 1929, has charged, demanded, collected, and received for the transportation intrastate of logs, carloads, except walnut, cherry and cedar, from points of origin to destinations within the State of Florida, the scale of rates prescribed by the said order of the said Interstate Commerce Commission, so decreed by the said Supreme Court of the United States to be unlawful and invalid as aforesaid, and that to the extent that the Atlantic Coast Line Railroad Company has so charged, demanded, collected and received rates for such transportation of such logs in excess of the said "Cummer Scale", it has overcharged the shipper and/or consignees of such logs, and that such excess charges constitute overcharges within the meaning of the statutes of the State of Florida and the rules of this Commission,

And it further appearing to this Commission and this Commission finding that by virtue of the erroneous decrees of the said United States District Court and its refusal to enjoin the said unlawful order of the said Interstate Commerce Commission, a great number of said overcharges

have been charged, demanded, collected and received by the said Atlantic Coast Line Railroad Company from a large number of separate shippers of such logs for the transportation thereof in intrastate commerce between points in Florida, and that divers of such shippers have demanded that this Commission on their behalf shall take such action, actions, proceeding or proceedings as shall cause restitution to be made to them respectively, to the extent of such overcharges and any penalties prescribed by law.

[fol. 42] It is therefore ordered as follows:

1. That the lawful rates for the transportation of logs, carloads except cedar logs (and except ash, gum, hickory, oak, pine and cypress logs not over six feet in length) for distances up to but not exceeding 170 miles, now in force and effect under the laws of the State of Florida, and on at all times since February 7, 1929, as well as prior thereto in force and effect under the laws of the State of Florida, is the distance scale of commodity rates described in said opinion of the Supreme Court of the United States as the "Cummer Scale", viz., the following scale of rates:

Mileage rates on logs, carloads, except cedar logs, per car of 50,000 pounds, excess in proportion. To be loaded and unloaded by owner and not to be unloaded on the railroads right of way applies only via A. C. L. R. R. direct. From Atlantic Coast R. R. Stations in the State of Florida to Atlantic Coast Line R. R. Stations in the State of Florida

Distance.	Rate column.
40 miles and under	855
60 miles and over 40	1050
90 miles and over 60	1150
100 miles and over 90	1300
110 miles and over 100	1400
130 miles and over 110	1600
160 miles and over 130	1700
170 miles and over 160	1850

And no other rates for the intrastate transportation of such logs in carloads for such distances between Atlantic Coast Line Railroad Stations in Florida now is or at any time since February 7, 1929, has been lawful.

[fol. 43] 2. That the distance scale of commodity rates set forth in the next preceding paragraph of this Order shall continue in force and effect and shall be applicable in intrastate commerce from all points of origin to all destinations within and throughout the State of Florida, without exception, upon the lines of the said Atlantic Coast Line Railroad Company, until the further order of this Commission.

3. The Attorney General of the State of Florida, and the special counsel of the Railroad Commission of the State of Florida be, and they are hereby requested and directed to take such steps as in their judgment may be necessary or expedient to bring about the restitution by the said Atlantic Coast Line Railroad Company to all shippers and/or consignees of all overcharges which have been charged, demanded, collected and received by the said Atlantic Coast Line Railroad Company since February 7, 1929, as aforesaid, and to that end to institute in said United States District Court for the Northern District of Georgia, Atlanta Division, or in any other court, at law or in equity, for the benefit of such shippers and in the name of the State of Florida, and/or the name of this Commission, such proceedings as shall bring about speedy restitution.

4. All orders and parts of orders of this Commission which are in conflict with this order are hereby vacated.

Done and ordered by the Railroad Commissioners of the State of Florida in session at their office in the City of Tallahassee, Florida, this 5th day of March, A. D. 1931.

Eugene S. Matthews, Chairman.

[Similar amendments filed in two constituent causes are omitted in printing.]

[fols. 44-62] [File endorsement omitted.]

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* * * * * * *

[fol. 63] IN UNITED STATES DISTRICT COURT

In Equity

No. 514

[Title omitted]

RESPONSE TO MOTION FOR DECREE IN ACCORDANCE WITH THE MANDATE AND FOR ORDER OF RESTITUTION—Filed March 7, 1931

Now comes Atlantic Coast Line Railroad Company and makes response to the motion by the State of Florida, which appears by Honorable Fred H. Davis, its Attorney General, and of A. S. Wells, E. S. Mathews and Mamie G. Eaton, who constitute the Florida Railroad Commission and who appear by Honorable T. T. Turnbull, Special Counsel, and for response says:

[fol. 64] 1

Respondent was the defendant in a certain proceeding brought by Georgia Public Service Commission against Atlantic Coast Line Railroad Company in the Interstate Commerce Commission, which proceeding is No. 18364 on the Docket of said Commission. Said proceeding resulted in a report and order of the said Commission dated the 2nd day of August, 1928, and which became effective on the 8th day of February, 1929. The said report and order are published in 146 I. C. C. 717. The said report and order are referred to and made parts hereof. Two amendments were made to the said order for the purpose of clarification. In said order of the Interstate Commission the following is contained:

"It is further ordered, That said defendant be, and it is hereby, notified and required to cease and desist from practicing the undue preference and advantage, undue prejudice, and unjust discrimination found in said report to exist in the relation of intrastate and interstate rates and to establish, put in force, and maintain rates for the transportation of logs, except walnut, cherry, and cedar, in carloads, minimum weight 40,000 pounds, in intrastate com-

merce within the State of Florida, which shall be the same as those prescribed in the next preceding paragraph hereof as reasonable for the transportation in interstate commerce from points in the State of Florida to destinations in the State of Georgia."

[fol. 65] The rates there referred to were in excess of those which had been previously in effect for intrastate transportation of the aforementioned kind of logs in Florida over the lines of the Atlantic Coast Line Railroad Company.

2

After the entry of the aforementioned order the State of Florida, acting through its said Attorney and the said members of the Railroad Commission, filed a bill in the United States District Court for the Northern District of Georgia, the same being in equity No. 514, against the United States and the Interstate Commerce Commission, seeking to set aside the aforementioned order of the Commission. Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company also filed in said Court a like bill for the same purpose against the same defendants. Wilson Lumber Company also filed a bill in said Court against the United States of America for the same purpose. The said bills being at issue were heard in this Court, constituted as provided by statute.

3

This Court heard the said bills and rendered an opinion and decree on the 17th day of January, 1929, which dismissed the said bills, but construed the order of the Commission to be limited to origins in the State of Florida north of and including Jacksonville, Gainesville, Bur-[fol. 66] nett's Lake and High Springs, which territory is sometimes referred to as North Florida. This opinion is reported in 30 Fed. (2d) 116, as is referred to.

4

After the said opinion and decree the Florida Railroad Commission entered its order No. 979 dated January 30, 1929, effective instanter, copy of which is hereto attached and marked "Exhibit No. 1" and made a part hereof, and

undertook to fix certain rates for the transportation of the said logs between certain points within said part of Florida known as North Florida. The Florida Commissioners then filed their bill in equity in the Circuit Court of Duval County, Florida, in their own names as such Commissioners and in the name of the State of Florida. The purpose of the said bill was to enforce the last aforementioned order No. 979 of the Florida Commission. This respondent filed its petition and bond for the removal of said last described suit to the United States District Court for the Southern District of Florida. The said removal was denied by the State Court. This respondent then caused the record of said proceedings in the Circuit Court of Duval County, Florida, to be filed in the United States District Court for the Southern District of Florida, which was the appropriate District Court for such purpose, and [fol. 67] thereupon the Circuit Court of Duval County, Florida, completely lost jurisdiction of the said cause by the proceedings to remove, if any it ever had. An ancillary bill was then filed by this respondent in the United States District Court for the Southern District of Florida against the members of the Railroad Commission of Florida, seeking to restrain and enjoin the members of the Railroad Commission from prosecuting said suit in the Circuit Court of Duval County and motion was made for a temporary restraining order and injunction.

5

This respondent did on February 7, 1929, file in the United States District Court for the Northern District of Florida its bill against the members of the Florida Railroad Commission, in which it sought a restraining order and injunction from enforcing the Florida Commission's Order No. 979. The aforementioned original bill and said ancillary bill were dismissed by the Honorable William B. Sheppard, presiding as Judge of the United States District Court for the Northern District of Florida, and by him presiding as Judge of the United States District Court for the Southern District of Florida. Appeal was taken on said Ancillary bill to the Honorable the Circuit Court of Appeals for the Fifth Circuit, and on the 14th of February, 1929, that court entered its order restraining the [fol. 68] appellee from enforcing the order of the Circuit

Court of Duval County, Florida, hereinbefore mentioned and from enforcing the aforementioned writing called the Florida Railroad Commission's Order No. 979.

6

On April 20, 1929, the Railroad Commission of the State of Florida entered an order in this proceeding, known as its Order No. 990, copy of which is hereto attached marked "Exhibit No. 2" and made a part hereof. By the said Order No. 900 the rates for the transportation of logs of the kind involved in this proceeding between points on the Atlantic Coast Line Railroad in Florida were "suspended" and it was provided that "This order shall remain in force and effect until the further order of the Railroad Commissioners of the State of Florida." Respondent avers that at the time of the filing of the motion to which response is now being made the said Order No. 990 was in effect, and it had not been suspended at any time from the date of its issuance to the date of the filing of the above mentioned motion. The rates known as the Cummer scale of rates were suspended by the Railroad Commission of Florida on the 20th day of April 1929 and have remained in suspense from that time to the time of the filing of the motion to which response is now being made, towit: the [fol. 69] 28th day of February, 1931, and this respondent avers on information and belief that they are still in suspense.

7

In the meanwhile, and on the 5th day of October, 1928, this respondent filed with the Interstate Commerce Commission its tariffs, the object of which was to put into effect the rates prescribed by the Interstate Commerce Commission in its order entered August 2, 1928, in its aforementioned proceedings No. 18364. The said filing of said tariffs was made with the Interstate Commerce Commission in accordance with that Commission's said order of August 2, 1928. The said tariffs were duly and legally filed with said Commission. The same tariffs were filed at the same time with the Florida Commission.

8

Thereafter a motion was made by the State of Florida and the members of its said Railroad Commission for a

rehearing on supplemental bill. Said motion was granted and rehearing was had, and on the 22nd day of March, 1929, an opinion on the rehearing was rendered, which is reported in 31 Fed. (2d) 580, and thereafter on April 22, 1929, a decree was entered thereon by this Court in part as follows:

"It is, for the reasons states in our opinion March 22, 1929 (which opinion is duly filed as part of the record), ordered, adjudged and decreed that the original and supplemental bill be and the same is now dismissed and the relief prayed denied."

Said opinion and decree are referred to and made parts of this response, as fully as though herein set out.
[fol. 70] Appeals were taken from the said decree by the complainants in said proceedings. On the 5th day of January, 1931, the Honorable the Supreme Court of the United States rendered its opinion in said causes reversing the above mentioned decree. A part of the said opinion is as follows:

"Comparing the Florida intrastate rates on logs with other intrastate rates and with interstate rates, the Commission reached the conclusion that the intrastate rates assailed were less than reasonably compensatory.

"But to justify the Commission in the alteration of intrastate rates, it was not enough for the Commission merely to find that the existing intrastate rates on the particular traffic were not remunerative or reasonably compensatory. The authority to determine the reasonableness per se of intrastate rates lay with the State authorities and not with the Interstate Commerce Commission."

The reversal of said cause was brought about on account of procedural defects found by the Court to exist in the Commission's report and order, and not upon the merits of the case.

9

Thereafter and on the 13th day of February, 1931, mandates were issued in each of said cases. Each of said mandates contains the following:

"On consideration whereof, it is now and here ordered, adjudged and decreed by this court that the decree of the said District Court, in this cause be, and the same is hereby

reversed, and that the portion of the order of the Interstate Commerce Commission under review in this Court, with respect to intrastate rates, be, and the same is hereby, remanded to the District Court of the United States for the Northern District of Georgia for further proceedings in conformity with the opinion of this court.

"You, therefore, are hereby commanded that such fur-
[fol. 71] ther proceedings be had in such cause, in conformity with the opinion and decree of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding."

10

This respondent avers that the Interstate Commerce Commission in its aforementioned report found as follows:

"It is manifest, we believe, that the intrastate rates assailed, which on the average are less than half of the proposed interstate rates, are less than reasonably compensatory. The rate for 160 miles yields 4.25 mills a ton-mile, and, based on a lading of 60,200 pounds, 12.8 cents a car-mile. They are approximately one-half of the rates prescribed in Rates on Chert, Clay, Sand and Gravel, 122 I. C. C. 133, on sand and gravel in the Southeast and less than one-half of the rates prescribed in the supplemental report in that case, 140 I. C. C. 85, to points in Florida south of the Jacksonville-River Junction line of the Seaboard Air Line. As stated in the original report in that case, sand and gravel are of unusual low value, it being doubtful whether any traffic moves which is worth less at point of production, load very heavily, and normally move in considerable volume, without unusual switching operations at either end and without anything in the nature of special services."

The Commission then found that the intrastate rates should correspond with the said interstate rates.

11

This Court found in its first opinion that there was substantial evidence to sustain the conclusions of the Commission on all material points.

[fol. 72] 12

In its second opinion, rendered on the 22nd day of March, 1929, this Court found in part as follows:

"There was in evidence, also, comparisons of the attacked rate with rates on similar logs of other railroads in Florida and in adjacent states, and on articles, such as sand, gravel, brick, lime, and cement, which, like logs, are shipped in large lots, loaded and unloaded by patrons, and expose the carrier to little risk of loss. There was further comparison with interstate rates established by the Commission itself for this same railroad and in this same territory. All these rates were shown to be from twice to thrice the attacked log rate. On the face of things the log rate is too low, and likely to burden the carrier. The Commission expressly finds that it is obviously unremunerative. It is shown that the commerce in logs over the Coast Line system is and will continue to be very large, and this item of its rates, is, therefore an important one."

13

The Interstate Commission found in its said report as follows:

"The present interstate and intrastate rates and the proposed interstate rates from north Florida in cents per hundred pounds, and the earnings thereunder per car of 50,000 pounds for distances to 170 miles, follows:

[fol. 73]

	Florida-Georgia interstate		Florida intrastate		Proposed interstate	
Distance	Rate, cents	Earnings	Rate, cents	Earnings	Rate, cents	Earnings
5 miles	2.5	$12.50	1.71	$8.55	2.5	$12.50
10 miles	3	15.00	1.71	8.55	2.5	12.50
15 miles	3.5	17.50	1.71	8.55	3	15.00
20 miles	3.5	17.50	1.71	8.55	3	15.00
25 miles	4	20.00	1.71	8.55	3.5	17.50
30 miles	4	20.00	1.71	8.55	3.5	17.50
35 miles	4.5	22.50	1.71	8.55	4	20.00
40 miles	4.5	22.50	1.71	8.55	4	20.00
45 miles	5	25.00	2.10	10.50	4.5	22.50
50 miles	5	25.00	2.10	10.50	4.5	22.50
55 miles	5.5	27.50	2.10	10.50	4.5	22.50
60 miles	5.5	27.50	2.10	10.50	4.5	25.00
65 miles	6	30.00	2.30	11.50	5	25.00
70 miles	6	30.00	2.30	11.50	5	25.00
75 miles	6.5	32.50	2.30	11.50	5.5	27.50
80 miles	6.5	32.50	2.30	11.50	5.5	27.50
85 miles	7	35.00	2.30	11.50	5.5	27.50
90 miles	7	35.00	2.30	11.50	6	30.00
95 miles	7	35.00	2.60	13.00	6	30.00
100 miles	7	35.00	2.60	13.00	6	30.00
110 miles	7.5	37.50	2.80	14.00	6.5	32.50
120 miles	8	40.00	3.20	16.00	6.5	32.50
130 miles	8.5	42.50	3.20	16.00	7	35.00
140 miles	8.5	42.50	3.40	17.00	7	35.00
150 miles	9	45.00	3.40	17.00	7.5	37.50
160 miles	9	45.00	3.40	17.00	7.5	37.50
170 miles	9.5	47.50	3.70	18.50	8	40.00

The said Commission's report also contains the following finding:

"We further find that whether the aforesaid rates pertain to transportation in interstate commerce or to transportation in intrastate commerce the transportation services in each instance are performed by defendant under substantially similar circumstances and conditions."

This respondent avers that each of the above mentioned findings of the Interstate Commission was supported by evidence; and that each of the said findings is true and correct. It also avers that the said findings of this court above referred to were correct and the facts so found were [fol. 74] true.

14

This respondent avers that the purpose of the motion in this case is to require respondent to apply to the transportation of logs over its lines in Florida in intrastate commerce for distances up to 170 miles a scale of rates commonly known as the Cummer scale, and to cause that application to be made for a time dating back to the 8th day of February, 1929, and to continue to apply the same in the future. Respondent avers that the said Cummer scale of rates is unjust and unreasonable and that the application of the same will require this respondent to haul the logs at rates which are not just and reasonable and are therefore, confiscatory. Respondent further avers that the rates in the said Cummer scale of rates are those which were found by the Interstate Commission in the said proceedings to be "less than reasonably compensatory" and which were likewise found by this Court in the said proceedings that "on the face of things the log rate is too low and likely to burden the carrier." The said scale of rates is and was at all times here involved unreasonable. The said Cummer scale of rates is as follows:

[fol. 75] 40 miles and under	$8.55 per car
60 miles and over 40 miles	10.50 per car
90 miles and over 60 miles	11.50 per car
100 miles and over 90 miles	13.00 per car
110 miles and over 100 miles	14.00 per car
130 miles and over 110 miles	16.00 per car
160 miles and over 130 miles	17.00 per car
170 miles and over 160 miles	18.50 per car

The interstate rates are from 46% to 233% higher than the said Cummer scale of rates for transportation over the lines of respondent under substantially similar circumstances and conditions.

15

Respondent avers that the rates under the said Cummer scale were at all times here involved and are now unjust and unreasonable, and if enforced will require the transportation of the logs involved without compensation that is reasonable and just and upon rates which are therefore confiscatory for the following reasons:

(1) The relationship between the revenue produced by the said Cummer scale of rates and the rates ordered in effect by the Interstate Commerce Commission for interstate transportation from this territory to points in Georgia, which interstate and intrastate traffic move, under substantially the same circumstances and conditions, (except as to movements south of the main line of the Seaboard Air Line between River Junction and Jacksonville, Florida, where higher rates should prevail,) and which interstate rates are substantially thos- shown in paragraph 13 hereof [fol. 76] under the column headed "Proposed interstate earnings"; the said Cummer scale of rates being oftentimes less than half of the said interstate rates.

(2) The relationship of the rates under the said Cummer scale to intrastate rates on the same commodities in Georgia; the said Cummer scale of rates being not more than one-half of the rates prescribed by the Georgia Commission for intrastate transportation in Georgia on the same commodities; the circumstances and conditions under which the two services are performed being substantially similar, except as noted in subparagraph (1) hereof.

(3) The relationship of the said Cummer scale of rates to the intrastate rates on the same commodities over the Atlantic Coast Line in North Carolina, South Carolina, Georgia, and Alabama, and with interstate rates, and with the average of those rates. The said comparison shows that the rates under the Cummer scale are very much lower than the rates in either of said States or the average thereof.

(4) The rates under the Cummer scale of rates are lower than the rates on the same commodities on other lines of road operating in the same territory intrastate in Florida, as for instance the Seaboard Air Line and the Georgia, [fol. 77] Southern & Florida Railway Company. The rates on the Seaboard Air Line at 60 miles are more than twice as high as the Cummer scale of rates, and at 150 miles they are still somewhat more than twice as high as the Cummer scale of rates.

(5) The rates under the Cummer scale, when compared with commodities having like transporation characteristics or having transportation characteristics which require no higher rates, show that the rates under the Cummer scale are not more than one-half to one-third of the rates on such commodities; some of said commodities being cotton seed, cotton seed hulls, clay, gravel, sand, stone, asphalt, salt, phosphate rock, cord wood, cross ties, cement, brick, artificial stone and lime. This is true when said commodities move intrastate in Florida over the lines of this respondent and as well when they move over the lines of other carriers in said State operating in competition with your respondent and also operating under similar circumstances and conditions.

(6) Said rates for transportation of logs known as the Cummer scale rates were unjust and unreasonable for that the same were insufficient to produce a return equal to the cost of rendering the service, or if there was any net return it was so low as to be entirely inadequate.

[fol. 78] 16

Respondent avers that the tracts of timber of the kind affected by the Cummer scale of rates on the lines of this respondent in the State of Florida are very extensive. At the time of the taking of testimony in this case the Brooks-Scanlon Corporation represented that it owned or controlled 1,027,432,000 feet of pine and cypress timber. This is equivalent to about 186,000 carloads. The Cummer Cypress Company represented that it owned or controlled timber which when logged would amount to about 127,158,000 feet which is equivalent to 28,257 carloads of logs. The Wilson Cypress Company represented that it owned or controlled 250,000,000 feet which when logged will produce

about 59,529 carloads. The Putnam Lumber Company represented that it owned more than 1,000,000,000 feet of pine and cypress which would produce about 180,000 carloads. In the bill filed in this case the Brooks-Scanlon Corporation, the Wilson Cypress Company and the Cummer Cypress Company represented that they owned in the aggregate 1,500,000,000 feet of standing uncut timber. Vast quantities of these timbers are still uncut. Besides these tracts there are other large tracts and many other small tracts of such timber on the lines of this respondent in Florida. The aggregate difference in revenue to be produced to this respondent from the movement of the said logs, if the same be moved under the Cummer scale, as compared with a reasonable scale of rates, that is, as compared with the rates fixed by the Interstate Commerce Commission, for the interstate commerce hereinbefore referred to from Florida points of origin to Georgia destinations, or rates for like transportation used over other lines [fol. 79] of road in Florida, would be a great sum, amounting to several million of dollars. The enforcement of the said Cummer scale of rates will impose upon this respondent the duty of devoting its property to such transportation service, either without any reward over and above the cost, or, if any reward, such reward will be wholly inadequate.

17

Respondent avers that the Railroad Commissioners of Florida have presented claims in their motion on behalf of seven persons who are alleged to have been shippers of logs and who claim of this respondent overcharges in various sums and said Commissioners aver "that there are persons who have been compelled to pay and who have paid such overcharges as aforesaid whose names are unknown to the complainants." In addition to that, claims are asserted in a like motion by Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company and Wilson Lumber Company of Florida. The amount in which said claims are to be filed or asserted against this respondent is not known to this respondent except to the extent as is set out in paragraph III of the motion of the Railroad Commissioners of Florida and in the same numbered paragraph of the motion filed on behalf of Brooks-Scanlon Corporation, Wilson Cypress Company and Cum-

mer Cypress Company and in the motion of the Wilson Lumber Company of Florida. The amount so claimed, as set out in said paragraphs of the said motions, aggregates [fol. 80] substantially in excess of $200,000.00.

18

Respondent respectfully avers that movants are not entitled to restitution for that:

(a) Said restitution is claimed upon the basis of the difference between the rate charged, to-wit: the rate fixed by the Interstate Commerce Commission, and the rate provided under the scale known as the Cummer scale. The said Cummer scale of rates was not in effect but was in suspense by order of the Railroad Commissioners of Florida as has been hereinbefore set out. It was not in effect from the 20th day of April, 1929, to the date of the filing of the motion now being answered.

(b) To order restitution on the basis as above set out would be to give to movants and the persons receiving refunds as restitution the benefit of rates which were at the time of the rendition of the service, and are now, unjust and unreasonable.

(c) To order restitution on that basis would have the effect of giving to the persons receiving the same the benefit of rates which have been determined by this Court in this proceeding to be unreasonable.

(d) Such restitution on the basis aforesaid would have the effect of giving to the persons receiving the same the [fol. 81] benefit of rates which have been determined by the Interstate Commission in this proceeding to be unreasonable.

(e) To require respondent to make payments so demanded of it as restitution on the aforesaid basis would be inequitable to this respondent for all of the reasons herein set out.

(f) To require this respondent to pay out moneys to shippers as overcharges for transportation of the logs here involved in intrastate commerce in Florida upon the basis of the difference between the charges actually received and the schedule of rates known as the Cummer scale would

deprive this respondent of its property without due process of law and of the equal protection of the law, for that it would have the effect of requiring respondent to render a transportation service at rates which are confiscatory, which would provide for it no return, or, if any return, a wholly inadequate one on the value of its property so used, all of which will be contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, upon which this respondent relies.

(g) For that the members of the Railroad Commission of the State of Florida and said special attorney and said Attorney General of Florida were in February 1929 restrained by the United States Circuit Court of Appeals for the Fifth Circuit from enforcing or undertaking to enforce [fol. 82] the order of the Railroad Commission of the State of Florida known as Order No. 979 which has been hereinbefore referred to, and which order of said Commission undertook to fix the rates for the movement of logs of the kind involved in this cause intrastate over the lines of this respondent for distances up to 170 miles with certain exceptions specified in the said Order No. 979 which said exceptions are inconsequential for the purpose of this case for that no traffic in said logs moved over the lines so excepted or if any of said traffic did move over said lines so excepted said movements were not in commercial quantities and of no moment whatever. The said order of the United States Circuit Court of Appeals is now in effect and has been in effect continuously from its date.

(h) The same order of the Circuit Court of Appeals enjoined the same persons from enforcing a certain order entered in the Circuit Court of Duval County, Florida entered in the case filed in said Court by the State of Florida acting through A. S. Wells, E. S. Mathews and Mamie G. Eaton, as the Railroad Commission and T. T. Turnbull, Special Counsel joined therein by Fred H. Davis, Attorney General. The said order of the Circuit Court of Duval County Florida entered in said cause undertook to restrain and enjoin the Atlantic Coast Line from charging any [fol. 83] other rates for the transportation of logs over its lines in intrastate commerce in the State of Florida for distances up to 170 miles except those rates fixed by the said Order No. 979 of the Florida Railroad Commission.

The said order of injunction of the United States Circuit Court of Appeals for the Fifth Circuit is still in force and effect.

19

Respondent further avers that for all of the reasons herein set out the rates scheduled, known as the Cummer scale, for the transportation of logs of the kind herein described and which movants purpose applying to the future transportation of such logs, are unjust and unreasonable, and confiscatory; and this respondent should not be required to render transportation service thereunder. To apply the said rates to such future transportation will have the effect of requiring this respondent to render transportation service as a common carrier to the public at rates which will not provide the cost of transportation, which will be confiscatory on that account, or if the same does provide a revenue equal to the cost of transportation, the net return will be wholly inadequate and will not be a reasonable reward for the service rendered nor a reasonable return upon the property so used.

[fol. 84] 20

This respondent avers that to require payments by this respondent as restitutions on the ba-is aforesaid would be as though this respondent were required to observe the rate adjudged to be unreasonable by this Court in this proceeding; that the Railroad Commissioners of Florida have no right or statutory power to prescribe or enforce any rate for the transportation of the commodities here involved which is unreasonable, and that the said rates which the said Florida Commissioners seek to enforce herein are unreasonable and were unreasonable at all of the times here involved, and it was never at any of the times here involved within the power of the said Commissioners to prescribe or enforce the same. For like reason the said Commissioners have no right or power to prospect-vely require the enforcement of the said scale of rates known as the Cummer scale. This respondent avers that to require it to make payment to movants by way of restitution on account of the shipment of said logs on the 8th day of February, 1929, will be to require it to yield to an unlawful and unreasonable rate and will be a taking of this re-

spondent's property without due process of law and will deny to respondent the equal protection of the law, contrary to the Fourteenth Amendment of the Constitution of the United States upon which respondent relies.

[fol. 85] 21

Respondent avers that all or very nearly all of the traffic in logs involved in this proceeding as to which restitution is asked moved over the lines of this respondent from origins in that part of the State of Florida heretofore described as north Florida and which were within the scope of the opinion and decree of this court rendered in the first hearing, as hereinbefore set out; that said shipments not only moved at rates which were unreasonable as hereinbefore set out but at rates which were especially unreasonable in comparison with the movement of the same kinds of logs intrastate commerce in Georgia to such points as Bainbridge, Thomasville, Quitman, Valdosta, and Waycross, which are very near the said Florida points of origin; and also especially in comparison with the rates on such logs moving interstate from Florida origins in said north Florida to destinations in Georgia.

22

Respondent is informed and upon information and belief alleges that the Georgia Public Service Commission has filed with the Interstate Commerce Commission a motion to reopen the said proceedings on its docket No. 18364 and to proceed to make the findings indicated in the said opinion of the Supreme Court of the United States to be necessary and proper to be made, and this respondent has also filed [fol. 86] with said Commission a motion on its own behalf praying in effect that said findings be made and that said Florida intrastate rates, known as the Cummer scale, be set aside under Sections 3 and 13 of the Interstate Commerce Act.

23

Respondent avers that the said members of the Florida Railroad Commission and the movants in the said several motions are undertaking to enforce the aforementioned Cummer scale of rates, and unless they be restrained and enjoined from enforcing the same this respondent, its of-

ficers and agents, will be subjected to a multiplicity of suits and prosecutions, fines and penalties in the manner provided and under the statutes of the State of Florida; or, this respondent, in terror of said fines, penalties and suits, will be required to yield to the said unlawful rates and thereby submit to undue, unlawful and unconstitutional exactions and the unlawful and unconstitutional taking of its property.

Respondent prays that:

(a) The mandate from the Honorable the Supreme Court of the United States be not now entered in this cause; but that this cause proceed, in conformity with the opinion and [fol. 87] decree of the Supreme Court, to the ascertainment of that which should be done according to right and justice in accordance with the laws of the United States, and upon such ascertainment said mandate be entered and decree be rendered.

(b) If the said mandate be now entered, that such order or orders and proceedings be had and entered as will adequately preserve the status while this court proceeds through its proper processes to determine, in conformity with the opinion and decree of the Supreme Court, that which is right and justice to the parties and to this respondent and that upon the ascertainment of that which is right and just to be done that this court enter its order of orders and decree or decrees accordingly.

(c) It be determined by this court that this respondent is under no obligation to make any payments to any of the persons mentioned in the motion of the movants herein on account of overcharges or restitution; that this be determined for each and all of the reasons hereinbefore in this response set out.

(d) The members of the Railroad Commission of Florida who are parties to this proceedings and their successors in office and their office-s and agents and attorneys be restrained and enjoined from undertaking to put into force [fol. 88] and effect the rates herein described and known as the Cummer scale of rates over the lines of this respondent in the State of Florida at distances up to 170 miles in the traffic of logs of the kinds herein described.

(e) This cause proceed to determination in such manner as may be prescribed by this court and that it be then determined that the said Cummer scale of rates is unjust and unreasonable and confiscatory and that the application thereof to such traffic over the lines of this respondent be permanently enjoined.

(f) To the end that multiplicity of suits may be prevented, that all persons at interest be restrained and enjoined from undertaking to enforce any overcharges or claims of restitution against this respondent on account of the matters and things mentioned in said motion or in this response except in this proceeding and before this court under such circumstances as this court may deem proper.

(g) It be determined that the Cummer scale of rates was not in force at any time as to the traffic here involved on or after the 8th day of February, 1929, not only because of the acts and orders of the Interstate Commerce Commission but also because of the orders of this court and because of the orders of the Railroad Commissioners of [fol. 89] Florida and also because of the restraining order and injunction issued out of the United States Circuit Court of Appeals for this Circuit, all of which have been hereinbefore set out.

(h) This court enter such other and further orders as may be meet and proper to the end that right and justice be done in this cause in accordance with the opinion of the Supreme Court of the United States and the mandate issued therefrom, insofar as said opinion and mandate are applicable thereto, and that this respondent have general relief as to all of the matters and things herein mentioned.

Respectfully submitted, Atlantic Coast Line Railroad Co., by Frank L. Glover, Asst. to V.-P., A. C. L. R. R. F. B. Grier, Carl H. Davis, Alston, Alston, Foster & Mois, Attorneys for Atlantic Coast Line Railroad Co.

[fol. 90] *Duly sworn to by Frank L. Glover. Jurat omitted in printing.*

[fol. 91] EXHIBIT No. "1" TO RESPONSE

Before the Railroad Commissioners of the State of Florida

ORDER No. 979

Changes in Intrastate Rates on Logs Except Walnut, Cherry and Cedar, From and to Certain Points in the Northern Part of Florida, Pursuant to Decision of Federal Court

Issued January 30, 1929. Effective January 30, 1929

1. This order is made in view of impending changes in certain intrastate rates on logs in carloads from and to certain points on Atlantic Coast Line Railroad within the State of Florida, which changes in rates have been filed with the Interstate Commerce Commission in the following schedules to become effective on February 8, 1929:

Agent Glenn's Southern Lumber Tariff, I. C. C. A-659, Supplements 10, 12, 13, 15 and 16;
Agent Glenn's Port Lumber Tariff, I. C. C. A-647, Supplements 8, 9, 11, 13 and 14;
Atlantic Coast Line Railroad Company's Florida Local Tariff, No. 20, I. C. C. B-2466, Supplements 4, 5, 6 & 7;

including specific items which purport to be issued in compliance with the orders of the Interstate Commerce Commission in its Docket Number 18364. The purpose of this Order is to amend the Florida intrastate rates to conform to the orders of the Interstate Commerce Commission in Docket 18364 as construed and defined by the District Court of the United States for the Northern District of Georgia, Atlanta Division, in equity, in its opinion dated January 17, 1929.

2. Whereas the said schedules would have the effect of increasing the rates on logs of various kinds and other various description- between points on the Atlantic Coast Line Railroad throughout the entire State of Florida without submitting the proposed increased rates to the Railroad Commissioners and receiving their approval as provided in General Rule No. 7 in Section 1 of the Rules and Regulations of the Railroad Commissioners of the State of Florida

and without a determination of such submission or application by the Railroad Commissioners as provided in Sec-
[fol. 92] tion 6730 of the Comp-led General Statutues and Section 4644 of the Revised General Statutes of 1920, which said submission, application, approval and determination must be procured before any increases or changes can lawfully be made in any existing intrastate rates or charges for transportation subject to the jurisdiction of the Railroad Commissioners of Florida.

3. Whereas the said tariffs and schedules insofar as they name increased rates on logs, or cancel existing rates on logs of various kinds and descriptions including veneer blocks or bolts namely, logs less than six feet in length, between points throughout the State of Florida on the lines of the Atlantic Coast Line Railroad Company purport to be issued in compliance with orders of the Interstate Commerce Commission in its Docket No. 18364, Georgia P. S. Commission v. A. C. L. R. R. Co., 146 I. C. C. 717;

4. Whereas, the District Court of the United States for the Northern District of Georgia, Atlanta Division, in equity in its opinion dated January 17, 1929, has construed and defined, for the purpose of rendering valid, the said order of the Interstate Commerce Commission in the said Docket No. 18364 as being limited in its territorial scope insofar as it prescribes intrastate rates on logs to those rates which apply on logs except walnut, cherry and cedar from points on Atlantic Coast Line Railroad's lines in Florida north of and including Jacksonville, Gainesville, Burnett's Lake, and High Springs, in one direction north bound for distances not in excess of 170 miles; and whereas the said schedules above named in Paragraph 1 hereof are not limited or restricted in accordance with the said special Federal Court's construction and definition of the said order of the Interstate Commerce Commission in its Docket No. 18364 and;

5. Whereas, it is deemed necessary in the public interests that the Railroad Commissioners of the State of Florida define the extent, if any, to which the intrastate rates on logs in Florida will or may be changes on February 8, 1929, by virtue of the filing and publishing of the tariffs and schedules named in Paragraph 1 hereof with the Interstate Commerce Commission.

6. It is hereby ordered that the present intrastate rates on logs of all kinds and descriptions including veneer blocks, bolts, or short logs which are in effect and lawfully published as required under the Laws of the State of Florida and the regulations of the Railroad Commissioners of the State of Florida on the date of this Order shall remain in full force and effect on and after February 8, 1929, until further Order of the said Railroad Commissioners of the State of Florida, notwithstanding the changes proposed to become effective on February 8, 1929, in the schedules and tariffs named in Paragraph 1 hereof; except that, so long as the said decision of the said Federal Court shall or may remain in force and unreversed, the said schedules and tariffs will, under authority of the Interstate Com- [fol. 93] merce Commission, have the effect of changing and increasing only and solely the intrastate rates under the following tariff descriptions: "logs, except cedar, cherry and walnut logs, carload minimum weight 40,000 pounds" (this description does not include bolts, i. e. logs not over six feet in length) for distances not exceeding 170 miles, only in one direction namely north bound to destinations in Florida on the direct short line routes of the Atlantic Coast Line Railroad from the list of stations hereinafter named on the lines extending from High Springs, Florida, through Baker's Mill, Florida, to and beyond DuPont Georgia, and on the line extending northward from Gainesville, Florida, through Burnett's Lake and through Jacksonville to and beyond Folkston, Georgia, viz.:

Points of Origin

Boulogne, Andrews, Hilliard, Dual, Callahan, Ratliff, Gary, Dinsmore, Pickett, Jacksonville;

Baker's Mill, Jasper, Marion, Suwanee, Rixford, Live Oak, Padlock, Pine Mount, McAlpin, O'Brien, Branford, Harvard & Groover, Thompson's Spur, Hildreths, Fort White, High Springs;

Herlong, Shelton, Columbia, Lake City;

East Alashua, Burnett's Lake;

Hague, Gracys, Paradise, T. & J. Crossing, Gainesville;

Florida Transfer, Valdosta Crossing, Cambon, Deeville, Baldwin, Mattox, McPherson, LaBuena, Stockert, Manning, Sapp, Harrah, Ellarbee, Raiford, Johnstown, Lake Butler, Townsend's Still, Putnam, Dukes, Munich, Worth-

ington Springs, Santa Fe, Hainesworth, Burnett's Lake and Alachua.

(Note: These stations are named in the Glenn Tariff, I. C. C. A-659, page 414, note A.)

The jurisdiction of the Interstate Commerce Commission over the rates named in the Exception above described has been upheld under the decision of the Federal Court, thus superseding the laws of the State of Florida and the regulations of the Railroad Commissioners of the State of Florida.

7. Ordered further that counsel for the Railroad Commissioners for the State of Florida be and is hereby authorized and directed to take such steps as may be or may become necessary to preserve the existing intrastate rates on logs of all kinds and descriptions and the rates on veneer blocks, bolts or short logs, which are lawfully in [fol. 94] effect between all points in the State of Florida, so that the same shall remain in full force and effect on and after February 8, 1929, notwithstanding the filing of the tariffs and schedules named in Paragraph 1 hereof with the exception of the intrastate rates on logs except cherry, walnut, and cedar from the points specified in Paragraph 6 hereof as prescribed by the Interstate Commerce Commission and upheld by the decision of the Federal Court as described in Paragraph 6.

8. Done and ordered by the Railroad Commissioners of the State of Florida in session at their office in the City of Tallahassee, Florida, this 30th day of January, 1929.

Railroad Commissioners of the State of Florida.
(Signed) A. S. Wells, Chairman. (Seal.)

[fol. 95] EXHIBIT No. "2" TO RESPONSE

Before the Railroad Commissioners of the State of Florida

Order No. 990

Changes in Intrastate Rates on Logs except Walnut, Cherry, and Cedar and except Ash, Gum, Hickory, Oak, Pine, and Cypress Logs not over six feet in length

This matter came on this day for further consideration and it appearing that since the entry by this Commission

on January 30, 1929, of Order No. 979 with respect to the rates above referred to the Interstate Commerce Commission on to-wit, February 5th, A. D. 1929, did amend its Order entered August 2nd, A. D. 1928, in that certain cause then pending before the said Interstate Commerce Commission, Docket No. 18364, entitled Georgia Public Service Commission vs. Atlantic Coast Line Railroad Company, 146 I. C. C. 717, and by such amendment in terms did exclude from the operation of said Order ash, gum, hickory, oak, pine and cypress logs not over six feet in length;

And it further appearing that after the entry by these Railroad Commissioners of said Order No. 979, said Interstate Commerce Commission to-wit, on February 7th, A. D. 1929, without notice to the State of Florida or to this Commission, and for the alleged purpose of clarifying the said Order of said Interstate Commerce Commisison dated August 2, 1928, did enter a supplemental Order in said Docket No. 18364, Georgia Public Service Commission vs. Atlantic Coast Line Railroad Company, wherein and whereby the said Interstate Commerce Commission did so modify the said Order dated August 2, 1928, as to order the said Atlantic Coast Line Railroad Company to apply between all points upon its lines within and throughout the entire State of Florida without exception the scale of rates set forth in said Order of August 2, 1928, for the transportation intrastate in Florida of logs, except walnut, cherry and cedar and except ash, gum, hickory, oak, pine and cypress logs not over six feet in length;

And it further appearing that afterwards the State of Florida and the Railroad Commissioners of the State of Florida did file in the United States District Court for the Northern District of Georgia, Atlanta Division, in that certain suit then pending therein wherein the State of Florida [fol. 96] and the Railroad Commissioners of Florida were complainants and the United States and Interstate Commerce Commission were defendants, a petition for rehearing and supplemental bill, to the end that the said Order of the said Interstate Commerce Commission as amended and clarified as aforesaid might be enjoined, annulled and set aside insofar as the said Order purported to affect intrastate rates between points in Florida;

And it further appearing that afterwards the said petition for rehearing was allowed and said supplemental bill

allowed to be filed and the said rehearing had, and that to-wit, on April —, A. D. 1929, the said United States District Court did enter its decree wherein and whereby it denied the relief prayed by the original bill and the supplemental bill above referred to, and did dismiss said original bill and said supplemental bill;

And the said Railroad Commissioners of Florida deeming that the said last described decree of said United States District Court is erroneous, have determined to appeal therefrom to the Supreme Court of the United States to the end that said Order of said Interstate Commerce Commission as amended and clarified as aforesaid shall be enjoined, annulled and set aside to the extent aforesaid; but the Railroad Commissioners of Florida recognize that the said decision of said United States District Court sustaining the said Order of the said Interstate Commerce Commission is the law of the land until the same shall be modified, set aside or reversed;

It is therefore ordered as follows:

1. That so much of said Order No. 979 entered by the Railroad Commissioners of the State of Florida January 30, 1929, as relates to intrastate rates between points on the lines of the Atlantic Coast Line Railroad Company in Florida for the transportation of logs, except walnut, cherry and cedar, and except ash, gum, hickory, oak and cypress logs not over six feet in length, be and the same is hereby suspended so long as the said decree of the said United States District Court for the Northern District of Georgia shall remain in force and effect and unmodified and unreserved.

2. That so long as the said decree of said United States District Court for the Northern District of Georgia shall remain in force and effect and unmodified and unreversed the distance scale of commodity rates in force and effect under the authority of the Railroad Commissioners of the State of Florida on and prior to February 7, 1929, for the transportation of logs except walnut, cherry and cedar, between points on the Atlantic Coast Line Railroad in [fol. 97] Florida, be and they are hereby suspended; but nothing in this Order shall affect any rate for the transportation intrastate, between points on the Atlantic Coast

Line Railroad in Florida, of ash, gum, hickory, oak, pine and cypress logs not over six feet in length under any scale of rates in force and effect under the authority of the Railroad Commissioners of the State of Florida on or prior to February 7, 1929.

3. This Order shall remain in force and effect until the further order of the Railroad Commissioners of the State of Florida.

Done and ordered by the Railroad Commission of the State of Florida in session at their office in the City of Tallahassee, Florida, this 20th day of April, A. D. 1929.

Railroad Commissioners of the State of Florida.
A. S. Wells, Chairman.

[Similar responses filed in two constituent causes are omitted in printing.]

[fol. 171] [File endorsement omitted.]

. . . . . .

fol. 171] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

In Equity

No. 514

[Title omitted]

MOTION TO STRIKE AND/OR DISMISS THE RESPONSE—Filed March 7, 1931

Come now the complainants in the above entitled cause, and move the Court to strike and/or dismiss the "Response to Motion for Decree in Accordance with Mandate and for Order of Restitution", and each and every paragraph and part thereof, severally, upon the following grounds, to-wit:

1. That neither the said response as a whole, nor any part nor paragraph thereof, states sufficient cause for the denial of the complainants' said motion as amended.

2. That the Supreme Court of the United States, by its decision, opinion, decree and mandate, has ordered, adjudged and decreed that the decree of this Court heretofore entered in this cause be, and the same was thereby reversed and that the portion of the order of the Interstate Commerce Commission under review in said Supreme Court of the United States with respect to intrastate [fol. 172] rates to be set aside and commends this Court that such further proceedings be had in this cause in conformity with said opinion and decree of the Supreme Court, as according to right and justice and the laws of the United States ought to be had; and the matters and things respectively and severally are conclusively deemed to be determined by said opinion and decree of said Supreme Court and are not here open to consideration.

3. That said Response and the several parts and paragraphs thereof, severally, invoked the exercise of an administrative power not possessed by this Court.

4. The Supreme Court of the United States in its opinion and decree in this cause found that the authority to determine the reasonableness per se of said state rates lay with state authority, that is to say, with the Florida Railroad Commission, and it is nowhere made to appear that any application has ever been made by the Atlantic Coast Line Railroad Company to said state authority to determine the reasonableness of such rates or to allow an increase in the level thereof.

5. It appears from the records in this cause that under the laws of Florida and the rules and regulations of the Florida Railroad Commission, made pursuant thereto, it was and is unlawful for any carrier to increase any state rate maintained under state authority without application to and approval by and consent from such state authority, and its appears from the record in this cause that no such application has ever been made by the said Atlantic Coast Line Railroad Company to such state authority.

6. That this Court is without jurisdiction in this cause to consider whether the said state rate (so found by the [fols. 173-184] Supreme Court of the United States to have been maintained in intrastate commerce subject to the authority of the State of Florida, and to have been pub-

lished as required by its laws), is compensatory or non-compensatory, reasonable or unreasonable, confiscatory or non-confiscatory.

7. That it appears from the record in this cause that after the Supreme Court of the United States had rendered its opinion in this cause, but before the coming down of the mandate herein, the Atlantic Coast Line Railroad Company sought in said Supreme Court substantially the same relief sought in its Response herein, and that the same was denied by the said Supreme Court.

8. That said Response, and each and every part thereof, is inapplicable and inappropriate and improper to be filed in opposition to said motion as amended.

9. It apears that the payment of the sums of which restitution is sought was compelled by the decree of this Court so reversed by the Supreme Court of the United States, and not otherwise, and that the said decree and mandate of the said Supreme Court required the restitution of such sums, all and singular.

10. That it appears from the opinion, decision, decree and mandate of the Supreme Court of the United States in this cause, that these complainants are entitled to the decree and order of restitution sought in the motion of these complainants as amended.

Each and every of the foregoing grounds are directed to the said Response of the said defendant, Atlantic Coast Line Railroad Company, as a whole and are likewise severally directed to each and every paragraph thereof, and to the several prayers for relief therein.

T. T. Turnbull, Fred H. Davis, Solicitors and of Counsel for Complainants.

[Similar motions filed in two constituent causes are omitted in printing.]

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* * * * * * *

[fol. 185] IN UNITED STATES DISTRICT COURT

In Equity. No. 5111.

[Title omitted]

ORDER MAKING MANDATE JUDGMENT OF COURT—Filed March 7, 1931

The mandate of the Supreme Court reversing the decree of this court having been here produced, upon motion by the complainants it is ordered that the mandate of the Supreme Court be made the judgment of this court and that the same be entered upon the minutes. In pursuance of the direction in said mandate that the portion of the order of the Interstate Commerce Commission under review in this cause with respect to intrastate rates be set aside, it is now considered, ordered and adjudged that all parts of the said order entered by the Interstate Commerce Commission on the 2nd day of August, 1928, as thereafter amended and clarified, in the proceeding before said Commission entitled Georgia Public Service Commission, vs. Atlantic Coast Line Railroad Company, numbered 18364 on the docket of said Commission, which prescribed or attempted to prescribe rates for the transportation of logs in intrastate commerce in the State of Florida on the lines of the defendant and intervener, Atlantic Coast Line Railroad Company, in said State, or required or attempted to require the said railroad company to establish, put in force and maintain the rates so prescribed for the transportation of logs in intrastate commerce in the State of Florida, were and are invalid and [fol. 186] unlawful and that such parts of said orders as amended and clarified be enjoined, set aside, and annulled.

In further pursuance of said mandate directing further proceedings in conformity with the opinion of the Court, the pleadings now filed in this cause seeking restitution for the complainants and those opposing the same by defendants, and asking further equitable relief, are reserved for further consideration, the court hereby retaining jurisdiction for the futher hearing of the same and decision thereupon, and jurisdiction is further reserved for the consid-

eration of any and all other questions proper to be considered in the cause.

This March 7th, 1931.

Samuel H. Sibley, United States Circuit Judge.
Wm. H. Barrett, United States District Judge.
E. Marvin Underwood, United States District Judge.

[fol. 187] [File endorsement omitted.]

[fol. 188] IN UNITED STATES DISTRICT COURT

In Equity. No. 512

[Title omitted]

ORDER MAKING MANDATE JUDGMENT OF COURT—Filed March 7, 1931

The mandate of the Supreme Court reversing the decree of this court having been produced, upon motion by the complainant it is ordered that the mandate of the Supreme Court be made the judgment of this court and that the same be entered upon the minutes. In pursuance of the direction in said mandate that the portions of the order of the Interstate Commerce Commission under review in this cause with respect to intrastate rates be set aside, it is now considered, ordered and adjudged that all parts of the said order entered by the Interstate Commerce Commission on the 2nd day of August, 1928, as thereafter amended and clarified, in the proceeding before said Commission entitled Georgia Public Service Commission vs. Atlantic Coast Line Railroad Company, numbered 18364 on the docket of said Commission, which prescribed or attempted to prescribe rates for the transportation of logs in intrastate commerce in the State of Florida on the lines of the defendant and intervener, Atlantic Coast Line Railroad Company, in said State, or required or attempted to require the said railroad company to establish, put in force and maintain the rates so prescribed for the transportation of logs in intrastate commerce in the State of Florida, were and are invalid and unlawful and that such parts of said orders as amended and [fol. 189] clarified be enjoined, set aside and annulled.

In further pursuance of said mandate directing further proceedings in conformity with the opinion of the Court, the pleadings now filed in this cause seeking restitution for the complainant and those opposing the same by defendants, and asking further equitable relief, are reserved for further consideration, the court hereby retaining jurisdiction for the further hearing of the same and decision thereupon, and jurisdiction is further reserved for the consideration of any and all questions proper to be considered in the cause.

This March 7th, 1931.

Samuel H. Sibley, United States Circuit Judge.
Wm. H. Barrett, United States District Judge.
E. Marvin Underwood, United States District Judge.

[fol. 190] [File endorsement omitted.]

[fol. 191] IN UNITED STATES DISTRICT COURT

In Equity. No 514

[Title omitted].

ORDER MAKING MANDATE JUDGMENT OF COURT—Filed March 7, 1931

The mandate of the Supreme Court reversing the decree of this court having been produced, upon motion by the complainants it is ordered that the mandate of the Supreme Court be made the judgment of this court and that the same be entered upon the minutes. In pursuance of the direction in said mandate that the portion of the order of the Interstate Commerce Commission under review in this cause with respect to intrastate rates be set aside, it is now considered, ordered and adjudged that all parts of the said order entered by the Interstate Commerce Commission on the 2nd day of August, 1928, as thereafter amended and clarified, in the proceeding before said Commission entitled Georgia Public Service Commission, vs. Atlantic Coast Line Railroad Company, numbered 18364 on the docket of said Commission, which prescribed or attempted to prescribe rates for the transportation of logs in intrastate

commerce in the State of Florida on the lines of the defendant and intervener, Atlantic Coast Line Railroad Company, in said State, or required or attempted to require the said railroad company to establish, put in force and maintain the rates so prescribed for the transportation of logs in intrastate commerce in the State of Florida, were and are invalid and unlawful and that such parts of said orders as amended and clarified be enjoined, set aside and annulled. [fol. 192] In further pursuance of said mandate directing further proceedings in conformity with the opinion of the Court, the pleadings now filed in this cause seeking restitution for the complainants and those opposing the same by defendants, and asking further equitable relief, are reserved for further consideration, the court hereby retaining jurisdiction for the further hearing of the same and decision thereupon, and jurisdiction is further reserved for the consideration of any and all other questions proper to be considered in the cause.

This March 7th, 1931.

Samuel H. Sibley, United States Circuit Judge. Wm. H. Barrett, United States District Judge. E. Marvin Underwood, United States District Judge.

[fol. 193] [File endorsement omitted.]

[fol. 194] IN UNITED STATES DISTRICT COURT

In Equity. No. 514

[Title omitted]

FIRST AMENDMENT TO RESPONSE OF A. C. L. R. R. Co.—Filed March 17, 1931

To the Honorable Judges of said Court:

Now comes Atlantic Coast Line Railroad Company and with the leave of this Court amends its response heretofore filed to the motion of the above mentioned complainants, and for amendment says:

24. Respondent avers that the Florida Railroad Commission appeared in the hearings of the interstate commerce case, out of which the order, the subject matter of

this litigation, grew, and offered evidence to the effect that the scale of rates known as the Cummer scale was just and reasonable, and otherwise undertook in the said proceedings to cause the said Cummer scale of rates to be sustained. The said Commission then filed its bill in this Court in this cause, undertaking to restrain the order of the Interstate Commission setting aside the said rates, and the Florida Commission there undertook to show the said Cummer scale of rates was reasonable.

[fol. 195] After the first decree of this Court in this cause, the said Florida Commission issued its order Number 979 dated the 30th day of January, 1929, and effective the same date, in which it, the said Florida Commission, undertook to retain as the lawful rates in Florida the said Cummer scale of rates in all of the State of Florida except over minor lines of railroad over which none of the logs here involved move in any commercial quantity. Said Commission then sought an injunction against the Atlantic Coast Line in the Circuit Court of Duval County, Florida, in which it undertook to restrain the Atlantic Coast Line from putting into operation any rates except the said Cummer scale of rates in the State of Florida, except on the lines mentioned in its said order Number 979. The said Commission procured such injunction or restraining order from the said Circuit Court of Duval County. The said Florida Commission then opposed the removal of the said cause to the United States District Court for the Southern District of Florida and opposed an ancillary bill filed by this respondent seeking to restrain the said order Number 979 and the order of the said Circuit Court of Duval County, and the said Commission then opposed a bill filed by this respondent in the Northern District of Florida seeking to restrain the enforcement of order 979 and caused its bill to be dismissed. The said Florida Railroad Commissioners then prosecuted their appeal to the Supreme Court of the United States and there asserted the said Cummer scale of rates to be reasonable.

[fol. 196] On the 5th day of March, 1931, the said Florida Commission adopted an order which it has filed in this cause by supplemental or amended motion, and which is referred to, in which it declared that the said Cummer scale of rates had been the only lawful rates for the movement of said

commodity in the State of Florida over the lines of the Atlantic Coast Line from February 8th, 1929, forward.

The Florida Commission's attitude during the five years which have elapsed since the filing of the petition in the Interstate Commerce Commission by the Georgia Public Service Commission, in which the Georgia Commission sought relief against the Cummer scale of rates, has been one of active support of the said Cummer scale of rates through its counsel and through its members, and to appeal further to the said Commission in its behalf would be a useless formality.

25. In February, 1929, this respondent filed in the United States District Court for the Northern District of Florida its bill against the Florida Commissioners, seeking to restrain the said Commissioners from enforcing Order 979, which had been referred to in the original response and in this amendment for the reason therein set out. The said bill was dismissed, on motion of the Florida Commissioners, by the Judge of the said Court without calling two other judges to his assistance. Thereafter a rule absolute on a petition for mandamus was granted by the Supreme Court of the United States, directing the Judge of the United States District Court for the Northern District of Florida [fol. 197] to proceed with said cause in the manner required by statute. Thereafter the said cause came on for hearing and restraining order was denied because of the restraining order already then existing against Order 979 issued out of the Circuit of Appeals of the Fifth Circuit but without prejudice to the right of this respondent to renew the application therefor. The said cause is now pending in the said Court.

Respondent amends its prayers as set out in its original response, adding thereto the following:

(i) That this Court withhold action upon the prayer for restitution made by appellants in their original motion until the Interstate Commerce Commission shall have acted upon one or both of the two petitions or motions which have been filed with it in this matter, and which are referred to in its original response, and that it withhold action while the said Commission, which the Supreme Court in its opinion in this cause declared "is still at liberty, acting in accordance with authority conferred by the statute, to make such determinations as the situation may require," proceeds

to exercise that liberty and to make the determinations which this situation does require.

(j) That this Court restrain the Florida Railroad Commissioners, their officers and agents and attorneys, from further proceeding to enforce the scale of rates known as the Cummer scale of rates or to put the same into effect, and that upon final hearing the Cummer scale of rates be enjoined, held to be unjust and unreasonable, less than compensatory, and confiscatory, and that they be annulled, [fol. 198] and that the order of the Florida Commission entered on February 5th, 1931, insofar as it undertakes to enforce or to put into effect the said Cummer scale of rates or any part thereof be restrained and upon hearing be enjoined as unjust, unreasonable and confiscatory.

(k) That such temporary restraining order as may be necessary, proper or appropriate, to carry into effect the prayers of the original response and this amendment be entered, and that upon the final hearing upon this response and the amendment thereto the said restraining order be made permanent, and injunction issue enjoining and annulling the aforementioned scale of rates known as the Cummer scale of rates and all orders, actions and doings and filings of tariffs of the Florida Commission undertaking to give the same force and effect in any way whatsoever.

(l) That it be determined that the Scale of Rates called the Cummer Scale be held by this Court to have been in suspense and/or under injunction during all of the times herein involved and that they are made the proper basis for the restitution claimed by the Appellants in this cause.

(m) That Appellants are not entitled to restitution of this respondent on any of the matters set out in their several motions.

(n) This respondent prays for such other and further relief as may be necessary or appropriate, and for general [fol. 199] relief.

T. B. Grier, Carl H. Davis, Alston, Alston, Foster & Moise, Attys. for A. C. L. R. R.

[fol. 200] *Duly sworn to by Robert C. Alston. Jurat omitter in printing.*

Allowed subject to objections. Mch. 17th, 1931.
E. Marvin Underwood, U. S. Judge.

[Similar amendments filed in two constituent causes are omitted in printing.]

[fols. 201-217] [File endorsement omitted.]

[fol. 218] IN UNITED STATES DISTRICT COURT

No. 514

[Title omitted]

MOTION TO STRIKE AND/OR DISMISS AMENDMENT TO RESPONSE —Filed March 20, 1931

Come now the complainants in the above entitled cause and for motion to strike and/or dismiss the amendment of Atlantic Coast Line Railroad Company of its response herein and each and every paragraph and part of said amendment, severally, adopts the motion of these complainants to strike and/or dismiss said response heretofore filed herein and each and every ground of said motion, severally, and avers that said motion to strike and/or dismiss said response shall stand over and be applicable to said response as amended, as a whole, and to each and every paragraph and part thereof, severally.

T. T. Turnbull, Solicitors and of Counsel for Complainants.

[Similar motions filed in two constituent causes are omitted in printing.]

[fols. 219-223] [File endorsement omitted.]

[fol. 224] IN UNITED STATES DISTRICT COURT

No. 514

[Title omitted]

SECOND AMENDMENT TO RESPONSE OF ATLANTIC COAST LINE RAILROAD COMPANY—Filed April 15, 1931

To the Honorable Judges of the said Court:

Now comes the Atlantic Coast Line Railroad Company and with the leave of this Court amends its response here-

tofore filed to the motion of the above mentioned complainants, and for amendment says:

26

On the 6th day of April, 1931, the Honorable the Interstate Commerce Commission entered an order reopening its proceeding in Docket No. 18364, which is known as the Florida Log Rate Case; said order being as follows, to-wit:

[fol. 225] "At a General Session of the Interstate Commerce Commission, held at its office, in Washington, D. C., on the 6th day of April, A. D. 1931.

No. 18364

GEORGIA PUBLIC SERVICE COMMISSION

vs.

ATLANTIC COAST LINE RAILROAD COMPANY

Upon consideration of motions filed by complainant and defendant to reopen the above entitled proceeding and of replies to said motions filed by the State of Florida, Florida Railroad Commission, and intervenors Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company;

It is ordered that said proceeding be and it is hereby reopened for further hearing.

It is further ordered that said proceeding is assigned for such further hearing May 4, 1931, at 10 o'clock, A. M., Standard Time, at the Mayflower Hotel, Jacksonville, Florida, before Examiner Hoy.

By the Commission.

George B. McGinty, Secretary."

[fol. 226] 27

Respondent avers, therefore, that the said proceeding has been reopened generally and for all purposes, including the purposes specified by the Supreme Court of the United States in its opinion in the case of State of Florida vs. United States, 282 U. S. 194, at 215, as follows:

"The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commis-

sion, but to ascertain whether its findings are properly supported. If the facts as to intrastate transportation of logs in Florida are such as to justify an order as to intrastate rates in order to end an unjust discrimination as against interstate commerce, either as between persons and localities, or because of an undue burden upon the revenues of the carrier, the Interstate Commerce Commission is still at liberty, acting in accordance with the authority conferred by the statute, to make such determinations as the situation may require."

28

Respondent avers that the said cause has been set for hearing on the 4th day of May, which is closely at hand.

29

Respondent calls attention to the provisions of the mandate issued in this cause, which contains the following:

"You, therefore, are hereby commanded that such further proceedings be had in such cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding."

The said mandate being issued out of the Supreme Court and addressed to this Court.

[fol. 227] 30

Respondent avers that, for the reasons set out in its original response and in the first amendment thereto, it is right and just that the action of this Court in the matter of restitutions should be withheld pending the action of the Interstate Commerce Commission in the proceeding above referred to in Docket 18364.

Wherefore, this respondent renews the prayers of its original and amended response and prays that the action of this Court on the matter of restitutions prayed for by the appellants be stayed until the action of the Interstate Commerce Commission in the reopened case, and further prays such other acts, orders and decrees from this Court as may be just and right.

Respectfully, F. B. Greir, Robert C. Alston, E. W. Moise.

[fol. 228] *Duly sworn to by Robert C. Alston. Jurat omitted in printing.*

The foregoing amendment allowed subject to objection and demurrer. April 15, 1931. E. Marvin Underwood, U. S. Judge.

[Similar amendments filed in two constituent causes are omitted in printing.]

[fols. 229-241] [File endorsement omitted.]

[fol. 242] IN UNITED STATES DISTRICT COURT

No. 514

[Title omitted]

MOTION TO STRIKE AND/OR DISMISS SECOND AMENDMENT TO RESPONSE—Filed April 21, 1931

Come now the complainants in the above entitled cause and for motion to strike and/or dismiss the second amendment of Atlantic Coast Line Railroad Company of its response herein and each and every paragraph and part of said amendment, severally, adopt the motion of these complainants to strike and/or dismiss said response heretofore filed herein, and each and every ground of said motion, severally, and aver that said motion to strike and/or dismiss said response shall stand over and be applicable to [fol. 243] said response as last amended, as a whole, and to each and every paragraph and part thereof, severally, and as additional grounds in support of their motion to strike and/or dismiss said response as last amended, as a whole, and each and every paragraph and part thereof, severally, these complainants assert the following:

(11) That the effect of the said order of the Interstate Commerce Commission reopening the late proceedings before that body, is to direct that further testimony and evidence be taken, further investigation be had and further consideration be given by said Commission to the intrastate rates to be charged for the transportation of logs in the future, and it nowhere appears that said Commis-

sion has been asked to make any retroactive order affecting the level of said intrastate rates or is considering any such order.

(12) The said order of the Interstate Commerce Commission reopening the said proceedings and ordering the taking of further testimony in the future, and further hearings in the future with respect to intrastate rates for the transportation of logs, negatives any notion that the jurisdiction of the Interstate Commerce Commission to fix the level of intrastate rates is applicable to past transactions, or that the Interstate Commerce Commission will presume to exercise any such jurisdiction.

[fol. 244] (13) That the power of the Interstate Commerce Commission to prescribe intrastate rates even in cases where there are lawful findings supported by lawful evidence, is limited by the Acts of Congress to prescribing rates "thereafter to be charged" and said Commission has no power directly or indirectly, to enter any order superseding state power so as to affect the level of the lawful state rates applicable to past transactions.

(14) In view of the decision of the Supreme Court of the United States pointing out the nature and character of the evidence and findings necessary to support the invasion of the domain of the state by Federal authority, there is no reason soever to assume that as result of further evidence and further testimony and further hearings and further investigations to be conducted by said Commission any order will be entered by said Commission affecting in anywise the level of the lawful state rates for the intrastate transportation of logs in the future within Florida.

(15) Nothing that the Interstate Commerce Commission can say or do in the future can affect the right of these movants to restoration of the benefits that the Railroad Company has received by virtue of the former unlawful and invalid order of the said Commission, and by virtue of the former erroneous decrees of this Court in this proceedings.

Theo. T. Turnbull, Solicitors and of Counsel for Complainants.

[Similar motions filed in two constituent causes are omitted in printing.]

[fols. 245-253] [File endorsement omitted.]

[fol. 254] IN UNITED STATES DISTRICT COURT

In Equity. Nos. 511, 512, 514

[Title omitted]

ORDER REFERRING CAUSE TO SPECIAL MASTER—Filed July 31, 1931

Upon the motions of the complainants for restitution and the answers of the Atlantic Coast Line Railroad Company in opposition thereto, and the motions to strike said answers,

It is ordered and adjudged as follows:

First: On the intervention of the Atlantic Coast Line Railroad Company this specially constituted statutory court is without jurisdiction to enjoin rates established by the State of Florida for intrastate traffic, or to revise or amend the same. All prayers of the Atlantic Coast Line Railroad Company to this intent are therefore dismissed and stricken, without prejudice to any relief it may be elsewhere entitled to seek.

Second: This Court having on January 17th, 1929, and on April 22nd, 1929, refused to set aside and enjoin portions of the order of the Interstate Commerce Commission dated August 2nd, 1928, and effective February 8th, 1929, relating to transportation of logs in intrastate commerce in Florida under attack in this suit, and upon reversal of those judgments having on March 7th, 1931, vacated the [fol. 255] same, and set aside said portions of the order of the Interstate Commerce Commission upon the applications for restitution filed by the complainants of all moneys collected by the Atlantic Coast Line Railroad Company by virtue of said erroneous orders between the dates thereof and March 7th, 1931,

It is ordered that Horace M. Holden, Esq., of William Oliver Building, Atlanta, Georgia, be and is hereby appointed a Special Master to ascertain and report to this Court the sums severally due to the complainants or other persons represented by the Florida Railroad Commission in this suit by the Atlantic Coast Line Railroad Company as overcharges exacted between said dates by virtue of the said invalid order of the Interstate Commerce Commission, as measured by the difference between the amount collected and the established lawful rate in force at the time each shipment was made, as the Master may find it to have been. The Master shall require specific claims filed by each claimant, and proof as to each item unless agreed upon, and shall report all items with dates thereof, distinguishing those arising on shipments from points north of Jacksonville, Gainesville, Burnett's Lake and High Springs from those arising south thereof, and those of date prior to April 20th, 1929, when the Florida Railroad Commission is alleged to have altered its State rates, and classifying the findings otherwise as he may find necessary or convenient.

The Master is further authorized to make and report such findings of law as may be proper in the premises, and to make recommendation as to the amount and incidence of costs and expenses of the hearing and of this case. He [fol. 256] may employ a stenographer for the hearings and in the preparation of his report, and in his discretion may take evidence at points without the District and without the State of Georgia. Itemized claims for restitution are to be filed before him by the several claimants not later than September 1st, 1931, and he shall file his report not later than November 1st, 1931, unless further time be given by the Court.

This July 31st, 1931.

Samuel H. Sibley, U. S. Circuit Judge. Wm. H. Barrett, U. S. District Judge. E. Marvin Underwood, U. S. District Judge.

[fol. 257] File endorsement omitted.]

[fol. 258] IN UNITED STATES DISTRICT COURT

In Equity. Nos. 511, 512, 514

[Title omitted]

PETITION OF SPECIAL MASTER FOR INSTRUCTIONS—Filed Feb. 17, 1932

To Honorable Samuel H. Sibley, Judge of the United States Circuit Court of Appeals, Fifth Circuit; Honorable William H. Barrett, United States Judge of the Southern District of Georgia, and Honorable Marvin Underwood, United States Judge of the Northern District of Georgia:

The petition of Horace M. Holden, Special Master in the above stated cases, shows:

I

A copy of the Order appointing petitioner as Special Master in said cases is hereto annexed, marked Exhibit "A."

II

A hearing was had before petitioner as Special Master in said cases on January 29th and 30th, 1932. At said hearing testimony was introduced by the parties to said cases. During said hearing counsel for the Atlantic Coast Line Railroad Company, made the contention that the Florida rates on intrastate shipments of logs, known as the Cummer scale of rates, which claimants contend was in force during the time shipments of logs were made by claimants [fol. 259] was unreasonable, unjust and confiscatory and therefore void and beyond the statutory powers of the Florida Commissioners, and offered testimony in support of their contentions and for the purpose of showing that they were true. Objections were made by counsel for claimants to the admissibility of this testimony on the ground that said Court and your petitioner as Special Master are without authority to receive said evidence on the said contentions of the Atlantic Coast Line Railroad Company and especially was your petitioner as such Special Master without such authority because this Court in

the Order referring said cases to your petitioner as such Special Master decided that it was "without jurisdiction to enjoin rates established by the State of Florida for intrastate traffic or revise or amend the same."

Counsel for said Railroad Company contended that under the pleadings and law, and said order providing that your petitioner as Special Master should find the amount of overcharges by virtue of the invalid order of the Interstate Commission "as measured by the difference between the amount collected and the established lawful rate in force at the time each shipment was made", the Railroad Company had a right to show that the rate above referred to was not "the established lawful rate" in force at the time above referred to and that said testimony was admissible; especially as contended by said Company that if said rate is declared invalid Scale P rates will be the lawfully filed rates applicable to said shipments. At the conclusion of argument by counsel it was the opinion of your petitioner that before passing on the objections to the admissibility of the testimony above referred to, it would be proper for him to certify the question as to the admissibility of said [fol. 260] evidence to the Court appointing him Special Master and ask for instructions in regard to the same.

III

Wherefore your petitioner requests the Court to instruct him as to whether or not to hear said testimony offered for the purpose of showing that said rates known as the Cummer scale of rates, contended by claimants to be the rates that should have been charged for said shipments of logs were unreasonable, unjust or confiscatory and pass on the question as to whether or not said rates were beyond the statutory power of the Florida Railroad Commissioners or otherwise unlawful because unreasonable, unjust or confiscatory.

This 16th day of February, 1932.

Respectfully submitted, Horace M. Holden, Special Master.

[fols. 261 & 262] EXHIBIT "A" TO PETITION OF MASTER

[Omitted. Printed side page 254 ante.]

[fol. 263] [File endorsement omitted.]

[fol. 264] IN UNITED STATES DISTRICT COURT

In Equity. Nos. 511, 512, 514

[Title omitted]

ORDER ON PETITION OF SPECIAL MASTER FOR FURTHER INSTRUCTIONS—Filed March 18, 1932

We have declined to entertain any application in this case to enjoin or revise Florida State rates. We have held, following the mandate of the Supreme Court, that the attacked order of the Interstate Commerce Commission is void and can itself give the Atlantic Coast Line Railroad Company no aid or protection. We have ordered restitution, and fixed the measure of it as "the difference between the amount collected and the established lawful rate in force at the time each shipment was made as the Master may find it to have been". The parties, as we are now advised, differ as to what the established lawful rate was. We understand the petitioners to insist that the Cummer Scale was the established lawful rate at the time of each shipment, and the Atlantic Coast Line Railroad Company to insist that the Cummer Scale had been suspended at the date of some of the shipments by an order of the Florida Railroad Commission and that the scale proposed by the Interstate Commerce Commission had been substituted, so [fol. 265] that the latter by the action of the State Railroad Commission became the established lawful rate of the State for the time being; and that at such times as the substitution did not obtain the Cummer Scale, while prima facie the established lawful rate, was not under the law of Florida conclusively lawful although established but subject to attack even in private litigation between shippers and carrier in suits for overcharges or undercharges. We intended to refer such contentions to the Master for his in-

vestigation and decision, not being ourselves sufficiently advised as to the law of Florida by which they are governed for us at once to pass upon them. In making restitution this court should deprive the party benefitting by its erroneous decision of all benefit of the order of the Interstate Commerce Commission which the court should have restrained, but should not deprive that party of any right otherwise; for the charges sought to be recovered were not directly collected by virtue of any judgment or process of this court but the court is involved only because it failed to interfere. We are of opinion that if the Atlantic Coast Line Railroad Company had, without intervening in this case and becoming a party to this litigation, made the charges it did and in a suit brought by the shippers in a State court to recover as for overcharge could under the laws of Florida have defended its charges as it now proposes, it should have the same right in this proceeding. If, on the other hand, in such a suit the Cummer Scale under [fol. 266] the law of Florida would have been the conclusive measure of the lawful charge it should be so treated by the Master here. The Master is directed to act accordingly.

This 16th day of March, 1932.

Samuel H. Sibley, United States Circuit Judge.
Wm. H. Barrett, United States District Judge.
E. Marvin Underwood, United States District Judge.

[fol. 267] [File endorsement omitted.]

[fol. 268] IN UNITED STATES DISTRICT COURT

In Equity. Nos. 511, 512, 514

[Title omitted]

REPORT OF HORACE M. HOLDEN, SPECIAL MASTER APPOINTED BY THE COURT IN THE ABOVE STATED CASES—Filed Nov. 14, 1932

Statement of Facts

What is known as the Cummer scale of rates during a long period was charged for shipments over Atlantic Coast Line Railroad Company (hereinafter referred to as

A. C. L.) between designated points in Florida of logs, except walnut, cherry and cedar, and except ash, gum, hickory, oak, pine and cypress logs, not over six feet in length up to 170 miles. It began in 1914. The Cummer scale was much lower than the interstate rates, and on May 3, 1926, the Georgia Public Service Commission filed its petition with the Interstate Commerce Commission (hereinafter referred to as I. C. C.) claiming that the rates were unjustly discriminatory and unduly prejudicial; that the intrastate rates were preferential to intrastate shippers in Florida and unduly prejudicial to interstate shippers from Florida to Georgia, and that they were unduly discriminatory against and a burden on interstate commerce. It asked that reasonable, non-prejudicial and non-discriminatory rates be ordered. The I. C. C., on August 2, 1928, passed an order that the intrastate rates were unreasonable to the extent that they exceeded a specified scale fixed [fol. 269] by the I. C. C. for interstate commerce. It also found that the intrastate rates for corresponding distances result, and will result, in undue preference and advantage of shippers in intrastate traffic within the State of Florida, and in undue prejudice to shippers of interstate traffic from points in the State of Florida to points in the State of Georgia, and in unjust discrimination against and a burden on interstate commerce and that this condition can and should be removed by the establishment of rates for intrastate shipments in Florida which shall correspond with specified rates found reasonable for interstate application from Florida to Georgia.

The complainants in the case shown in the caption (hereinafter referred to as claimants) filed in this court their bills for injunction against the enforcement of the order of the I. C. C. These cases were consolidated and on the 17th of January, 1929, this Court rendered its decision wherein it construed the order as applying to shipments in that part of Florida on the A. C. L. which is "north of and including Jacksonville, Gainesville, Burnetts Lake and High Springs" and as thus construed the order was sustained.

The I. C. C. on February 5, 1929, amended its order and directed that it be changed in language for the purpose of clarification as follows: "In the fourth paragraph substitute for 'within the State of Florida' the following: 'within and throughout the entire State of Florida, without excep-

tion' ", and on March 22, 1929, this Court rendered another opinion finding that the order of the I. C. C. as amended was valid.

Claimants took the case to the Supreme Court of the United States which reversed the decision of this Court and held that the order of the I. C. C. was invalid because of lack of intermediate findings necessary to support its order. The Supreme Court said with reference to the order that the Court "was not called upon to examine the evidence or to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit".

[fol. 270] After mandates were issued by the Supreme Court claimants asked for a decree of this Court in accordance with them and made motion for an order of restitution. Claimants seek to recover from the A. C. L. overcharges claimed by them to be the difference between the amounts they paid the A. C. L. from February 8, 1929, to March 5, 1931, for shipments of logs according to the rates fixed by the I. C. C. order sustained by decree of this Court and the amount which should have been charged under State rates known as the Cummer scale, with interest at the rate of 8 per cent from the date each payment was actually made by them.

The evidence and agreement of counsel show the alleged overcharges would be $293,946.38 as measured by the difference between the amount collected and amount that would have been collected under the Cummer scale if collections had been made under it.

The A. C. L. filed responses to demands of claimants for restitution, setting up various reasons why no order for restitution should be granted.

The Court passed an order appointing the undersigned as Special Master to hear testimony and make report of his findings as therein specified. This order required claimants to file specific claims and proof as to each item unless agreed upon. Claimants did file claims and an agreement was reached between them and the A. C. L. as to the amount of alleged overcharges referred to in the claims filed.

After the first hearing before the Master he made application to this Court for instructions in regard to matters therein referred to and the Court gave them in an order filed and appearing in the record.

After this Court on January 17, 1929, rendered its first decision wherein it construed the order of the I. C. C. as applying only to shipments from designated places in the Northern part of Florida, the Florida Railroad Commission on January 30, 1929, passed what is known as Order [fol. 271] No. 979 wherein reference was made to rates fixed by the I. C. C. for the transportation of logs being applicable on Northbound traffic from designated points in that part of Florida known as Northern Florida and to rates for transportation of logs known as the Cummer scale being applicable to the remainder of the State. This order was passed before the second order of the I. C. C. which was rendered on the 5th day of February, 1929, for the alleged purpose of clarifying its order of August 2, 1929, by amendment to it expressly stating rates fixed by it were applicable "within and throughout the entire State of Florida without exception", and before the second decision and opinion of this Court on March 22, 1929, finding that the order of the I. C. C. as amended was valid.

A bill was filed by the State of Florida acting through the Florida Railroad Commission, the Attorney General and the Special Attorney for the Railroad Commission in the Circuit Court of Duval County, Florida, to enjoin the A. C. L. from charging any rates except those stated in Order No. 979 which were the Cummer scale except for certain Northbound traffic from designated places in what is known as Northern Florida. The A. C. L. filed a petition to remove the case to the United States District Court for the Southern District of Florida which the Circuit Court of Duval County denied, and passed an order enjoining the A. C. L. from enforcing any rates except those set out in Order No. 979.

The petition for removal was filed in the U. S. District Court and a bill was filed in this Court on February 6, 1929, by the A. C. L. to enjoin the State Circuit Court of Duval County from proceeding in the case. A restraining order was denied and the bill dismissed on February 8, 1929.

An appeal was entered by the A. C. L. to the U. S. Circuit Court of Appeals for the Fifth Circuit and this Court granted on February 14, 1929, a temporary restraining or- [fol. 272] der enjoining the enforcement of Order 979 of

the Florida Commission and the order of the State Circuit Court of Duval County and requiring the appellees to show cause on February 21, 1929, why the restraining order should not be continued in force and an injunction granted. A hearing was had on that date. The Court never rendered any decision in the case and on motion of appellees filed March 19, 1931, the Court dissolved the restraining order on March 30, 1931. On January 6, 1932, the Court dismissed the appeal and awarded costs against the A. C. L., the appellant.

After the I. C. C. on February 7, 1929, amended its previous order clearly making the intrastate rates fixed by it applicable in all parts of Florida, what is known as Order 990 was passed by the Florida Commission on April 20, 1929, suspending so much of Order 979 passed on January 30, 1929, as relates to intrastate rates between points on the lines of the A. C. L. in Florida for the transportation of specified logs and provided that the distance scale of commodity rates in force and effect under the authority of the Florida Commission "on and prior to February 7, 1929, for the transportation of" specified logs "be and they are hereby suspended".

On March 5, 1931, Order No. 1032 was passed by the Florida Commission stating that since February 7, 1929, the Cummer scale has been in force on intrastate shipments and ordering that proceedings to secure restitution for shippers because of having paid the rate fixed by the I. C. C. be instituted.

[fol. 273] Findings of Law

(1)

ORDER 990, DATED APRIL 20, 1929, WAS PASSED BY THE FLORIDA RAILROAD COMMISSION ONLY FOR THE PURPOSE OF PROVIDING THAT RATES IN FLORIDA FOR THE TRANSPORTATION BY THE ATLANTIC COAST LINE RAILROAD COMPANY OF SPECIFIED LOGS BE THOSE FIXED BY THE ORDER AS AMENDED OF THE INTERSTATE COMMERCE COMMISSION SUSTAINED BY THE DECREE OF THIS COURT AND WAS PASSED SOLELY BECAUSE OF SAID ORDER OF INTERSTATE COMMERCE COMMISSION AS AMENDED AND SAID DECREE AND IN RECOGNITION OF THE BINDING AND CONTROLLING FORCE AND EFFECT OF SAID ORDER AND DECREE.

THE DECISION OF THE SUPREME COURT OF THE UNITED STATES HAVING DECLARED THE ORDER OF THE INTERSTATE COMMERCE COMMISSION INVALID AND REVERSED THE DECREE OF THIS COURT SUSTAINING IT, SAID ORDER 990 SHOULD BE TREATED AND IS TREATED AS NUGATORY AND OF NO FORCE OR EFFECT AT ANY TIME IN SO FAR AS IT MAY BE CONSTRUED AS UNDERTAKING TO AUTHORIZE OR TO MAKE VALID ANY CHARGES OR COLLECTIONS BY THE ATLANTIC COAST LINE RAILROAD COMPANY FROM FEBRUARY 8, 1929, TO MARCH 5, 1931, MADE UNDER OR BY VIRTUE OF ANY ORDERS OF THE INTERSTATE COMMERCE COMMISSION AND DECREES OF THIS COURT.

Order 990 of the Florida Commission refers to action of the I. C. C.; the former Order No. 979 of the Commission; pleadings filed by the Commission in this Court to enjoin and set aside order of the I. C. C. in so far as it undertakes to affect intrastate rates between points in Florida; decree of this Court denying the injunction and other relief stated; the opinion of the Florida Commission that the decree was erroneous and its determination to appeal therefrom to the Supreme Court of the United States. After making the above references, the order, before the entry therein of the [fol. 274] provisions and terms of the order, says:

"but the Railroad Commissioners of Florida recognize that the said decision of said United States District Court sustaining the said Order of the said Interstate Commerce Commission is the law of the land until the same shall be modified, set aside or reversed."

The Order states that the rates therein referred to were suspended "so long as the said decree of the said United States District Court for the Northern District of Georgia shall remain in force and effect and unmodified and unreversed."

The Order plainly shows on its face the intention of the Commissioners that it was passed solely and only because of the Order of the I. C. C. and the decree of this Court. The record shows that the Commission was fighting to keep in force the Cummer scale on intrastate shipments of logs and there is nothing in the Order to show that it had any intention or desire to voluntarily change these rates but shows the contrary by its declaration in the Order that in its opinion the decree, the effect of which was to change the rates, was erroneous and further shows that the Order

was passed under protest and with complaints and threats to have the decree reviewed by the Supreme Court of the United States.

The order of the I. C. C. and the decree of the Court made rates in conflict with then-existing rates in intrastate shipments in Florida and the Order was to have the minutes of the Commission show that by virtue of the decree of the Court the rates appearing on the records of the Commission to be in force had been changed. The Commission in passing the order simply recognized the fact that under the Act of Congress the rates fixed on intrastate shipments in a proceeding of this kind, unless set aside, went into effect, and the Florida Commission had no right to change these rates. The Order was simply declaratory of the existing situation produced by a superior authority.

[fol. 275] It must be presumed that the Commission and its attorneys knew that if the Supreme Court reversed the decree of this Court and declared the order of the I. C. C. invalid that collections by the A. C. L. under the rates fixed by the I. C. C. would not by virtue thereof be lawful. After this reversal by the Supreme Court, the order of the Florida Commission suspending the Cummer scale passed because of the decree of this Court is no more lawful than the collections made by the A. C. L. of charges for shipments because of this same decree.

The order did not affect the situation in any respect and does not show that the Commission meant to exercise its power to make rates, but only shows its intention to do its duty in complying with the decree of the Court. The order simply provided for that to be done what would have been done without the order.

Neither the order of the I. C. C. nor the decree of this Court was void for want of jurisdiction or void on its face for any other reason and was binding until set aside. If the order is in any respect in conflict with the order of the I. C. C. sustained by the decree of this Court, it was void during the period in question. If it is in conformity to this order of the I. C. C. and the decree of the Court, it is without force or effect as this order and decree would be in effect without any assistance from or even acquiescence by the Florida Commission.

[fol. 276] (2)

ORDER 979, DATED JANUARY 30, 1929, WAS PASSED BY THE FLORIDA COMMISSION ONLY FOR THE PURPOSE OF PROVIDING THAT INTRASTATE RATES SHOULD BE THE SAME AS THOSE FIXED BY ORDER OF INTERSTATE COMMERCE COMMISSION AS CONSTRUED BY THE FIRST DECREE OF THIS COURT, AND WAS PASSED SOLELY BECAUSE OF SAID ORDER AND DECREE.

THE DECISION OF THE SUPREME COURT OF THE UNITED STATES HAVING DECLARED THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION INVALID AND REVERSING THE DECREES OF THIS COURT SUSTAINING THEM, ORDER 979 SHOULD BE DECLARED AND IS DECLARED NUGATORY AND OF NO FORCE OR EFFECT AT ANY TIME TO THE SAME EXTENT THAT ORDER 990 HAS BEEN IN FINDING NUMBER (1) DECLARED NUGATORY.

Order 979 passed by the Florida Railroad Commission January 30, 1929, was entered after the order of the I. C. C. dated the 2nd day of August, 1928, and after the first opinion and decision of this Court dated January 17, 1929, and before the order of the I. C. C. dated the 5th day of February, 1929, amending its previous order and before the decree of this Court dated March 22, 1929, sustaining the order as amended. The A. C. L. after the first opinion of this Court filed schedule of rates with the I. C. C. to become effective February 8, 1929. Order 979 says:

"The purpose of this order is to amend the Florida intrastate rates to conform to the orders of the Interstate Commerce Commission in Docket 18364 as construed and defined by the District Court of the United States for the Northern District of Georgia, Atlanta Division, in equity, in its opinion dated January 17, 1929."

This Order 979 further states that this Court in its opinion dated January 17, 1929, has construed the order of the I. C. C. "as being limited in its territorial scope in so far as it prescribes intrastate rates on logs to those rates [fol. 277] which apply on logs except walnut, cherry and cedar from points on Atlantic Coast Line Railroad's lines in Florida north of and including Jacksonville, Gainesville, Burnett's Lake and High Springs, in one direction northbound for distances not in excess of 170 miles; and whereas (fol. 94) the said schedules above named in Paragraph 1

hereof are not limited or restricted in accordance with the said special Federal Court's construction and definition of the said order of the Interstate Commerce Commission in its Docket No. 18364."

The order after making the above and other statements proceeds to state what rates would be in effect on and after February 8, 1929. The statements in the order that the purpose of the order was to amend the Florida intrastate rates to conform to the order of the I. C. C. as construed by this Court show there was no intention to do anything except because of the decree of this Court and in obedience to it and in conformity with it.

After Order 979 was passed the I. C. C. amended its order for the alleged purpose of clarifying it by striking the words "within the State" in the fourth paragraph and substituting therefor the words "within and throughout the State without exception." This Court afterwards rendered another decision sustaining the decree as amended.

In this second opinion of this Court rendered on a rehearing and filed March 22, 1929, it is said:

"This clarifying order is not to be esteemed a new order, or even an amendment extending the former one, but is only a clarification of that which was found before to be uncertain, and (fol. 218) though made without further hearing or evidence, it is none the less effective from its date, at least. We have therefore to examine the record more closely and see if a state wide change of the rate is sustainable. Except as to the territorial application of the order we find no occasion to modify what was previously ruled. The evidence does not show any actual or potential interstate commerce from South Florida in such logs as are involved in this rate."

[fol. 278] This amendment was dated February 5, 1929, and previous orders provided that rates go into effect February 8. Whether the amendment of the I. C. C. to its order clearly making state wide application of specified rates became effective only at its date, February 5, 1929, or from date of the order amended, Order 979 should be adjudged a nullity in so far as it relates to intrastate rates for shipments of specified logs between points on the A. C. L. in Florida. While Order 990 dated April 20, 1929, suspended these rates, Order 979 as far as it relates to them should be declared nugatory from its date of Janu-

ary 30, 1929, and should be so declared even if Order 990 suspending the rates had never been passed. All parts of Order 979 should be declared nugatory and of no force or effect from its date to the extent before stated. The decision of the Supreme Court left standing no part of order of the I. C. C. as it was originally or as amended and left standing no part of either of the decrees of this Court and therefore said orders and decrees and all parts thereof should be declared nugatory and treated as though they had never existed, and the same is true of such parts of Order 979 as were enacted only in consequence of and in consonance with the decree of this court.

It is likewise true that any part of Order 979 that is in conflict with the orders of the I. C. C. and the decrees of this Court should be and is declared a nullity. Under the Acts of Congress the orders of the I. C. C. and decrees of a court of the kind in which this case is pending and in a proceeding of the kind in which the litigants are contending are supreme and are superior to authority of a State Commission, and in a collision between them the latter goes down. But there was no intention of the Florida Commission in passing Order 979 to provide for anything in conflict with the first decree of the Court.

[fol. 279] (3)

THE SCHEDULE OF TARIFFS FILED BY THE A. C. L. AFTER THE FIRST AND BEFORE THE LAST ORDER OF THE I. C. C. MADE APPLICATION OF RATES FIXED BY THE I. C. C. HAVE APPLICATION THROUGHOUT THE ENTIRE STATE WHICH WAS CONTRARY TO THE FIRST ORDER OF THE I. C. C. AS CONSTRUED BY THE FIRST DECREE OF THIS COURT AS LIMITING THE APPLICATION OF THE RATES TO SPECIFIED TERRITORY IN FLORIDA, AND THIS SCHEDULE OF RATES AT THE TIME FILED WAS ILLEGAL IN SO FAR AS THEY MADE RATES APPLICABLE THROUGHOUT THE STATE, THOUGH BECAME LEGAL AFTER THE SECOND ORDER OF THE I. C. C. AND DECREE OF THE COURT SUSTAINING THIS ORDER MAKING APPLICATION OF THE RATES THROUGHOUT THE ENTIRE STATE.

THE FILING OF THIS SCHEDULE OF RATES AND CHARGES FOR SHIPMENTS ACCORDING TO THESE RATES BY THE ATLANTIC COAST LINE RAILROAD COMPANY WERE SOLELY BECAUSE OF THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION AND THE DECREES OF THIS COURT SUSTAINING SAID ORDERS, WHICH ORDERS AND DECREES WERE SET ASIDE BY THE SUPREME COURT OF THE

UNITED STATES. THE FILING OF SAID SCHEDULE SHOULD, THEREFORE, BE AND IS DECLARED NUGATORY AND OF NO FORCE OR EFFECT AT ANY TIME TO THE SAME EXTENT THAT ORDER 990 IN FINDING NUMBER (1) HAS BEEN DECLARED NUGATORY.

[fol. 280] (4)

THE ATLANTIC COAST LINE RAILROAD COMPANY HAVING FILED A SCHEDULE OF RATES WITH THE INTERSTATE COMMERCE COMMISSION MAKING INTRASTATE RATES APPLICABLE THROUGHOUT THE ENTIRE STATE OF FLORIDA AND THESE INTRASTATE RATES FIXED BY THE ORDER OF THE INTERSTATE COMMERCE COMMISSION ACCORDING TO THE CONSTRUCTION OF THE ORDER BY THIS COURT BEING APPLICABLE ONLY TO A LIMITED TERRITORY IN FLORIDA, THE RESTRAINING ORDER OF THE CIRCUIT COURT OF DUVAL COUNTY ENJOINING ATLANTIC COAST LINE RAILROAD COMPANY FROM CHARGING ANY RATES EXCEPT THOSE IN ORDER 979 WAS PROPERLY GRANTED.

THE RESTRAINING ORDER WAS ISSUED SOLELY BECAUSE OF THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION AND DECREE OF THIS COURT AND THOUGH THE INTERSTATE COMMERCE COMMISSION LATER, ON FEBRUARY 7, 1929, AMENDED ITS PREVIOUS ORDER, CLEARLY MAKING SAID RATES WHICH WENT INTO EFFECT FEBRUARY 8TH, APPLICABLE THROUGHOUT THE STATE, AND NOTWITHSTANDING THE FACT THAT THIS RESTRAINING ORDER OF THE STATE COURT WAS AT THE TIME PROPERLY GRANTED, THE DECISION OF THE SUPREME COURT REVERSING THE DECREES OF THIS COURT SUSTAINING THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION AND DECLARING THESE ORDERS INVALID VITIATED THE RESTRAINING ORDER OF THE STATE COURT IN SO FAR AS IT MAY BE CONSTRUED AS UNDERTAKING TO MAKE VALID ANY CHARGES OR COLLECTIONS ACCORDING TO ANY RATES FIXED BY ANY ORDER OF THE INTERSTATE COMMERCE COMMISSION MADE BY THE ATLANTIC COAST LINE RAILROAD COMPANY DURING THE PERIOD IN QUESTION, TO-WIT, FROM FEBRUARY 8, 1929, TO MARCH 5, 1931, AND SAID RESTRAINING ORDER SHOULD NOW BE AND IS DECLARED A NULLITY AND OF NO FORCE OR EFFECT AT ANY TIME TO THE SAME EXTENT THAT ORDER 900 IN FINDING NUMBER (1) HAS BEEN DECLARED NUGATORY.

[fol. 281] (5)

THIS COURT CONSTRUED THE ORDER OF THE INTERSTATE COMMERCE COMMISSION BEFORE IT WAS AMENDED AS MAKING

CERTAIN INTRASTATE RATES APPLICABLE ONLY IN A LIMITED TERRITORY IN FLORIDA AND THE FLORIDA COMMISSION PASSED ORDER 979 MAKING SAID RATES APPLICABLE ONLY IN SUCH TERRITORY. THE ATLANTIC COAST LINE RAILROAD COMPANY FILED SCHEDULES OF SAID RATES WITH THE INTERSTATE COMMERCE COMMISSION DECLARING SAID RATES APPLICABLE IN ALL PARTS OF FLORIDA. THE STATE COURT OF DUVAL COUNTY PASSED AN ORDER RESTRAINING THE RAILROAD COMPANY FROM CHARGING ANY RATES EXCEPT THOSE FIXED BY SAID ORDER 979, AND THEREAFTER, TO-WIT, ON FEBRUARY 7, 1929, THE INTERSTATE COMMERCE COMMISSION AMENDED ITS PRIOR ORDER, MAKING SAID RATES APPLICABLE THROUGHOUT THE ENTIRE STATE OF FLORIDA.

THE RESTRAINING ORDER GRANTED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT ON FEBRUARY 14, 1929, ENJOINING THE ENFORCEMENT OF THE RESTRAINING ORDER OF THE STATE COURT AND OF ORDER 979 WAS GRANTED SOLELY BECAUSE OF THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION AND THE DECREES OF THIS COURT.

IT WAS AT THE TIME PROPER TO GRANT THIS RESTRAINING ORDER BUT THE DECISION OF THE SUPREME COURT HAVING REVERSED THE DECREES OF THIS COURT SUSTAINING THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION AND DECLARING THESE ORDERS INVALID, NOTWITHSTANDING THE FACT THAT THE RESTRAINING ORDER OF THE CIRCUIT COURT OF APPEALS WAS PROPERLY GRANTED, IT SHOULD NOW BE AND IS DECLARED NUGATORY AND OF NO FORCE AND EFFECT AT ANY TIME TO THE SAME EXTENT AS ORDER 990 HAS BEEN IN FINDING NUMBER (1) DECLARED NUGATORY.

[fol. 282] (6)

THE COURT HAS NO EXPRESS AUTHORITY BY STATUTE IN PROCEEDINGS OF THIS KIND TO ENTERTAIN A MOTION FOR RESTITUTION OR TO ALLOW ONE FROM WHOM RESTITUTION IS SOUGHT TO RESIST THE MOTION, BUT THIS COURT HAS AUTHORITY TO ENTERTAIN SUCH MOTION AND TO ALLOW ONE FROM WHOM RESTITUTION IS SOUGHT TO DEFEND BY SHOWING A RIGHT TO RETAIN PART OR ALL OF THE OVERCHARGES CLAIMED, IF ANY WERE MADE.

The A. C. L. should not be denied the right to resist motion of claimants for restitution on the ground that the A. C. L. made charges fixed by order of the I. C. C. sustained by the decree of this Court when the A. C. L. had to

abide by these rates until the order and decree fixing them was set aside, and these rates were never declared too high by the Supreme Court or any other court, but the order and decree fixing them was set aside on procedural grounds.

The motion for restitution makes a new issue and practically a new case. Claimants were not required to ask for restitution in this case but inasmuch as they did ask it the same rights of the A. C. L. to defend exist in this case as would exist if claimants had asked for restitution in a separate and independent suit in another jurisdiction. The right to defend a suit for overcharges should not be in one [fol. 283] court different from that in another.

There is no statute denying the right to defend against a motion for restitution in a case of the kind litigants are in any more than there is a statute giving the right to make motion for restitution in such a case, and the Court retained jurisdiction for the purpose of trying issues made on motion for restitution in order that justice might be done claimants by the Court in which the right to restitution arose and whose erroneous decree was the cause of the overcharges, if any were made, but justice should likewise be done the A. C. L. by giving it the right to defend by showing that the claimants are not entitled to have restored to them any of the charges made under order of the Court entertaining the motion for restitution. These charges and collections were made in good faith under color of authority. The A. C. L. does not now hold possession of these collections under any color of authority, but it obtained possession under color of authority and under a bona fide claim of right. In many instances action by one in good faith under color of authority places the party so acting in a position different from that of one not acting in good faith and under no color of authority. In many instances the courts have held in restitution proceedings that under the facts existing it is a matter of discretion with the Court as to whether or not any restitution would be made. Under the facts in this case the Master does not think that the Court has any discretion to deny the right to restitution if claimants are entitled to recover overcharges, if any were made, but if any such discretion existed the Master would not hold that in the exercise of it the right should be denied.

[fol. 284]

(7)

THE ATLANTIC COAST LINE RAILROAD COMPANY IN THIS PROCEEDING IS NOT PRECLUDED FROM RESISTING THE MOTION FOR RESTITUTION BY SHOWING THAT THE CUMMER SCALE OF RATES IS INVALID BECAUSE UNJUST AND UNREASONABLE ON THE GROUND THAT THE RULES OF THE FLORIDA COMMISSION AND LAWS OF FLORIDA PROVIDE THAT RATES ESTABLISHED BY THE COMMISSION SHALL OBTAIN UNTIL A CHANGE IS MADE AFTER APPLICATION AND NOTICE TO PARTIES INTERESTED, AND NO CHANGE HAS BEEN MADE BY THE COMMISSION AND NO APPLICATION FOR A CHANGE HAS BEEN MADE BY THE RAILROAD COMPANY.

(7-A)

AFTER THE DECISION OF THE SUPREME COURT, THE FLORIDA COMMISSION WAS WITHOUT AUTHORITY TO CHANGE THE CUMMER SCALE OF RATES AND MAKE THEM APPLICABLE FROM FEBRUARY 8, 1929, TO MARCH 5, 1931, BECAUSE THEY WOULD HAVE BEEN RETROACTIVE, AND EVEN IF THE FLORIDA COMMISSION HAD AUTHORITY AFTER THE ORDER OF THE INTERSTATE COMMERCE COMMISSION PASSED ON AUGUST 2, 1928, RAISING THE CUMMER SCALE UNDER ITS AUTHORITY BY ACT OF CONGRESS, THE ATLANTIC COAST LINE RAILROAD COMPANY WAS EXCUSED FROM MAKING APPLICATION TO THE FLORIDA COMMISSION FOR SUCH CHANGE BECAUSE OF THE FACT THAT THE INTERSTATE COMMERCE COMMISSION HAD RAISED THE RATES AND FOR THE FURTHER REASON THAT FOR SOMETIME PRIOR THERETO THE FLORIDA COMMISSION, A PARTY TO THIS CASE, IN ITS PLEADINGS HAD BEEN CONTENDING THAT THE CUMMER SCALE WAS NOT UNJUST AND UNREASONABLE AND BY THE INTRODUCTION OF TESTIMONY AND OTHERWISE ENDEAVORED TO SUPPORT THIS CONTENTION.

[fol. 285]

(7-B)

IT IS ALSO TRUE THAT THE ATLANTIC COAST LINE RAILROAD COMPANY WAS EXCUSED FROM MAKING SUCH APPLICATION AT ANY TIME AFTER THE FLORIDA COMMISSION MADE SUCH CONTENTION IN PROCEEDINGS INSTITUTED BY THE GEORGIA PUBLIC SERVICE COMMISSION IN 1926, TO WHICH PROCEEDINGS THE FLORIDA COMMISSION AND THE ATLANTIC COAST LINE RAILROAD COMPANY WERE PARTIES MAKING OPPOSITE CONTENTIONS.

It is contended by claimants that under the rules of the Florida Railroad Commission and laws of Florida before

any intrastate rate in force in Florida can be changed, the change must be made by the Commission upon a hearing after notice to the parties interested. The Master does not think that under the facts of the case the A. C. L. is precluded from attacking the Cummer scale as being unjust and unreasonable because there was no change in the Cummer scale by the Florida Commission and no application by the A. C. L. for a change. An application for a change after the decision of the Supreme Court of the United States would have been of no benefit because the Commission cannot make retroactive rates, and the Commission from the beginning of this litigation begun in 1926 to date has been fighting for the Cummer scale, asserting and contending that it was not unjust and unreasonable and should be upheld. Before the I. C. C. fixed rates to become effective on February 8 in this case, the Florida Commission not only contended that the Cummer scale was not unjust by its counsel in this Court but made this contention in its pleadings and introduced testimony to support the contention. It contended that the testimony introduced by it and its adversaries did not show the Cummer scale to be unjust and the testimony referred to is in [fol. 286] many respects substantially the same as was introduced at the hearings before the Master. It is apparent that it would have been useless and futile for the A. C. L. to have made application to the Commission for a change of the Cummer scale.

Moreover, sometime prior to February 8, when the rates in question went into effect, the I. C. C. in these proceedings passed an order deciding that the Cummer scale was unjust and unreasonable, and this order was sustained by this Court in its two decisions. While the I. C. C. might, if the evidence justified it, have kept the intrastate rates known as the Cummer scale in force and lowered the interstate rates, it did not do so but by its order raised the Cummer scale. The A. C. L. is presumed to have believed that the order of the I. C. C. sustained by this Court, would be upheld by the Supreme Court and if it had been it would have been useless for the A. C. L. to have made application to the Florida Commission in an independent proceeding to change the Cummer scale. This fact offers some excuse for the A. C. L. not making application to the Commission. In view of the attitude and conduct of the Florida

Commission and the A. C. L. in this case, proceedings in this case in one sense is an application by the A. C. L. to the Railroad Commission to change the Cummer scale of rates or at least acquiesce in the change though not in form required by the rules of the Commission and laws of Florida.

[fol. 287]

(8)

THE ATLANTIC COAST LINE RAILROAD COMPANY IN RESISTING THE MOTION FOR RESTITUTION HAS THE RIGHT IN THIS PROCEEDING TO SHOW THAT THE CUMMER SCALE OF RATES WERE NOT THE LAWFUL ESTABLISHED RATES FROM FEBRUARY 8, 1929, TO MARCH 5, 1931, BECAUSE THEY WERE UNREASONABLE AND UNJUST, IN VIOLATION OF THE STATUTES OF FLORIDA, AND BECAUSE THEY DID NOT FURNISH AN ADEQUATE RETURN ON PROPERTIES USED AND WERE CONFISCATORY IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE CONSTITUTION OF FLORIDA AND THE CONSTITUTION OF THE UNITED STATES, AND IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE LATTER.

Claimants seek to recover the difference between the amount of charges collected by the A. C. L. under the rates fixed by the I. C. C. from February 8, 1929, to March 5, 1931, and what the charges collected would have been had the A. C. L. made charges and collections according to the rate known as the Cummer scale in existence under authority of the Florida Commission. Has the A. C. L. the right to resist the motion for restitution on the ground that the Cummer scale is not the lawful established rate existing at the beginning and throughout the period in question because the same was unjust and unreasonable?

This case was not begun solely for the purpose of having the Cummer scale declared unjust and unreasonable and in view of the nature of the proceedings in this case, under the Acts of Congress the A. C. L. could not in them have had the I. C. C. or this Court to simply declare the Cummer scale unjust without any further findings, as such action would have been without their respective jurisdictions.

[fol. 288] After the motion for restitution was made there arose in this case for the first time the right of the A. C. L. to directly attack the Cummer scale as being unjust and unreasonable and not the lawful established rate.

In resisting the motion of the claimants to recover overcharges the A. C. L. has the right to show, if it can, that for reasons above stated the Cummer scale is invalid. The due process clause and equal protection clause of the Federal Constitution prohibits the making of rates that are confiscatory or that do not allow an adequate return on properties used. The statute of Florida only permits the Florida Commission to make rates that are just and reasonable. It is also provided by statutes that the rates made by the Commission are prima facie valid. The Order of the I. C. C. and decree of this Court were also prima facie valid. The Cummer scale fixed by the Florida Commission would only be prima facie valid even if there was no statute or rule saying so.

[fol. 289] Finding of Fact

(9)

THE MASTER FINDS UNDER THE EVIDENCE THAT THE CUMMER SCALE OF RATES FROM FEBRUARY 8, 1929, TO MARCH 5, 1931, WAS UNREASONABLE AND UNJUST AND DID NOT FURNISH AN ADEQUATE RETURN ON PROPERTIES USED.

Finding of Law

(9-A)

IN VIEW OF THE FOREGOING FINDING OF FACT THE MASTER FINDS THAT THE CUMMER SCALE OF RATES WAS NOT THE LAWFUL ESTABLISHED RATES FROM FEBRUARY 8, 1929, TO MARCH 5, 1931, BECAUSE THEY WERE IN VIOLATION OF THE STATUTE OF FLORIDA AND IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE CONSTITUTION OF FLORIDA AND THE CONSTITUTION OF THE UNITED STATES AND IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE LATTER.

The Master has given careful consideration to the evidence introduced in regard to the question as to whether or not the Cummer scale in question attacked by the A. C. L. for the transportation of specified logs over the A. C. L. was valid and lawful during the period in question, to-wit, February 8, 1929, to March 5, 1931, and has reached the conclusion that under the evidence it is his duty to find that they are not. This conclusion is reached and finding made that these rates are not lawful without considering

the orders of the I. C. C. and decrees of this Court or anything in the decrees or opinions of the Court or findings or reports of the I. C. C. These are not considered or treated mer scale to be unjust and the testimony referred to is in as evidence before the Master.

[fol. 290] To discuss much of the testimony and what it shows would require much space in this report and to discuss only a small portion of it would be unsatisfactory. The Master does not see how any finding could be made under the uncontradicted evidence in the case other than that the Cummer scale was not reasonable and just in violation of the Statutes of Florida and did not furnish adequate returns to the A. C. L. on properties used in violation of the due process clause of the Constitution of Florida and of the United States and the equal protection clause of the latter.

In the first opinion of this Court filed January 17, 1929, it is said "we find substantial evidence to sustain the conclusions of the Commission on all material points" and in the second opinion filed March 22, 1929, after reciting some of the facts in the testimony, the Court said with reference to the Cummer scale "on the face of things the log rate is too low and likely to burden the carrier." While the above expressions of the Court are not considered as evidence before the Master and the Master would make the same rulings as to the Cummer scale had these expressions not been made, they are quoted only because they in a measure show that the finding of the Master is correct because the evidence upon which these quoted findings are based are in many respects substantially the same as the evidence before the Master.

The Master is not impressed with some of the rules applied by some of the witnesses of the A. C. L. in determining what was a reasonable and just rate. At the same time the evidence considered as a whole shows the Cummer scale would have been unreasonable and unjust during the period in question.

[fol. 291]

(10)

THE CUMMER SCALE HAVING BEEN DECLARED AS BEING INVALID FROM FEBRUARY 8, 1929, TO MARCH 5, 1931, NO PREVIOUS RATE IN FORCE AS A MATTER OF LAW BECOMES A LAWFUL ESTABLISHED RATE FOR THE PERIOD IN QUESTION.

(10-A)

THERE BEING NO LAWFUL ESTABLISHED RATE IN FLORIDA FOR THE TRANSPORTATION OF LOGS HEREINBEFORE REFERRED TO FROM FEBRUARY 8, 1929, TO MARCH 5, 1931, AND THE RATES CHARGED BY THE ATLANTIC COAST LINE RAILROAD COMPANY DURING THIS PERIOD HAVING BEEN CHARGED WITHOUT ANY LAWFUL AUTHORITY, THIS COURT HAS THE RIGHT IN THIS PROCEEDING TO FIND AND ADJUDGE WHETHER THE RATES CHARGED BY THE ATLANTIC COAST LINE RAILROAD COMPANY DURING THIS PERIOD WERE UNREASONABLE AND IF FOUND UNREASONABLE TO FURTHER FIND AND ADJUDGE WHAT WOULD BE THE PROPER RATE TO HAVE BEEN CHARGED DURING THE PERIOD IN QUESTION, AND IF THE SAME IS LOWER THAN THE RATE CHARGED BY THE ATLANTIC COAST LINE RAILROAD COMPANY TO RENDER A DECREE AGAINST THE RAILROAD COMPANY FOR THE AMOUNT OF OVERCHARGE DURING THE PERIOD IN QUESTION.

The Florida intrastate rate on logs charged, including the logs on which the Cummer scale obtained, in existence at the time the Cummer scale was inaugurated was what is known as the P scale which was higher than the Cummer scale. If it is held by a court in any case that when a rate existing is invalid, the rate becomes in force that existed at the time the rate held invalid was begun, a grave injustice might be done shippers or carriers because of being too low or too high because of having existed in a period when conditions prevailing were widely different from [fol. 292] those at the time they are reinstated, and if this previous rate was attacked and declared invalid, to put in effect another previous rate might likewise bring injustice to shippers or carriers and be set aside. To adopt the rule that every time one rate is held invalid, the rate existing at the time it began came into life might result in endless litigation and a final destruction of all established rates, in which event the common law rule would apply, allowing the carrier to charge what he pleased with the right of the shipper to sue for damages for any unreasonable charge. The fact that the Cummer scale is declared invalid does not of itself put in force the P rate or any other rate previously established by the Florida Commission.

If a rate is set aside by the Congress or a Legislature or a Commission that made it, the same authority making it at the time it set this rate aside would make another rate

to have application in the future. This Court did not make the Cummer scale and has no authority to make rates for the future. It has no express authority to directly set aside a rate or make a rate having application in the past. It has no express authority to award restitution but it does have such authority, and having authority to make restitution carrying with it as herein held authority in restitution proceedings to set aside a rate to prevent injustice, it has authority for the same purpose, to-wit: of preventing injustice, to fix a rate that was just and reasonable and that should have been charged during the period wherein overcharges were alleged to have been made for the purpose of determining whether there should be restitution and if so, how much. To do this in one sense would not be making a rate. It would be doing only what the Common Law allowed, that is, to award damages for unreasonable charges arbitrarily made by the carrier by finding and adjudging what would have been a proper charge, at the time the overcharges were made, for the actual services rendered by the carrier in the transportation of passengers or freight in the particular instances involved and only in these instances.

[fol. 293] If the Court sets aside a rate that obtained during a specified period in restitution proceedings, it would not have authority to require the Congress or a Legislature or a rate-making Commission to decide what should have been a reasonable and just rate during that period. It certainly would not as to the Congress or a Legislature and should not as to the I. C. C. or the Florida Commission because they are without authority to make rates for the purposes in question. It should not as to the Florida Commis- has authority in some instances to make reparations but not when only intrastate rates are involved in a case of this kind. The Master is of the opinion that this Court has authority to fix what is a just and reasonable rate to have been charged during the period in question. When the Cummer scale was shown unjust and invalid the burden was on claimants to show rate charged was unreasonable and if this was shown to also show what rate was reasonable that the amount of damages or overcharges could be determined.

The rates fixed by the I. C. C. were prima facie valid, but were set aside. The Cummer scale was prima facie

valid. When both are set aside, this Court should not say to claimants who paid the rates fixed by the I. C. C. and approved by the decree of this Court that they are not allowed to show, if they can, that these rates were unreasonable and unjust during the period in question, and show what rates during this period would have been reasonable and just, and to recover the overcharges made, if any. There being no established rates during the period the charges and collections in question were made by the A. C. L., if any wrongs have been done claimants by collections of the rates fixed by order of the I. C. C. sustained by this Court, it is within the authority of this Court of Equity to right them.

[fol. 294] The orders of this Court provided that the Master determine the amount of overcharges, if any, "as measured by the difference between the amount collected and the established lawful rate in force at the time each shipment was made, as the Master may find it to have been."

The Master has found that there was no lawful established rate in force at the time any shipment of logs hereinbefore referred to was made during the period in question. The Master feels that he is without authority under the order of the Court to make decision as to what should have been proper charges during the period in question and if less than amounts charged to award to claimants the amount of overcharges, if any were thereby shown.

But believing that the Court would have authority to make such decision, the Master feels that he should make ruling to that effect and has herein made such ruling because of the provisions of the order of the Court that "The Master is further authorized to make and report such findings of law as may be proper in the premises."

[fol. 295] (11)

THE ORDERS OF THE I. C. C., WHETHER PASSED BEFORE OR SINCE THE DECISION OF THE SUPREME COURT, ARE NOT ADMISSIBLE AS EVIDENCE UPON A HEARING IN THIS CASE BEFORE THE MASTER, ON THE GROUND THAT THEY ARE IRRELEVANT AND IMMATERIAL. THE SAME IS TRUE WITH REFERENCE TO ALL OF THE FINDINGS AND OF ALL PARTS OF THE REPORT OF THE I. C. C. INCLUDING THE EVIDENCE INTRODUCED BEFORE THE COMMISSION. THESE ORDERS, FINDINGS AND REPORT ARE TREATED AS

PARTS OF THE RECORD BEFORE THE COURT IN THE CASE, ESPECIALLY IN VIEW OF THE STATEMENTS OF COUNSEL, TO SHOW THE HISTORY AND STATUS OF THE CASE. NONE OF THEM HAVE BEEN CONSIDERED BY THE MASTER IN DETERMINING WHETHER OF NOT THE CUMMER SCALE WAS UNJUST AND UNREASONABLE.

(12)

OBJECTIONS BY CLAIMANTS TO THE EVIDENCE INTRODUCED BY THE A. C. L. OF RATES CHARGED BY OTHER RAILROADS FOR THE TRANSPORTATION OF LOGS IS OVERRULED, AND OBJECTIONS MADE BY THE A. C. L. TO EVIDENCE INTRODUCED BY CLAIMANTS AS TO RATES CHARGED BY OTHER CARRIERS FOR THE TRANSPORTATION OF LOGS ARE LIKEWISE OVERRULED.

ALL OBJECTIONS TO TESTIMONY NOT SPECIFICALLY RULED ON ARE OVERRULED.

[fol. 296] Findings of Fact

(1)

ORDER 990, DATED APRIL 20, 1929, WAS PASSED BY THE FLORIDA RAILROAD COMMISSION ONLY FOR THE PURPOSE OF PROVIDING THAT RATES IN FLORIDA FOR THE TRANSPORTATION BY THE ATLANTIC COAST LINE RAILROAD COMPANY OF SPECIFIED LOGS BE THOSE FIXED BY THE ORDER AS AMENDED OF THE INTERSTATE COMMERCE COMMISSION SUSTAINED BY THE DECREE OF THIS COURT AND WAS PASSED SOLELY BECAUSE OF SAID ORDER OF INTERSTATE COMMERCE COMMISSION AS AMENDED AND SAID DECREE AND IN RECOGNITION OF THE BINDING AND CONTROLLING FORCE AND EFFECT OF SAID ORDER AND DECREE.

(2)

ORDER 979 DATED JANUARY 30, 1929, WAS PASSED BY THE FLORIDA COMMISSION ONLY FOR THE PURPOSE OF PROVIDING THAT INTRASTATE RATES SHOULD BE THE SAME AS THOSE FIXED BY ORDER OF INTERSTATE COMMERCE COMMISSION AS CONSTRUED BY THE FIRST DECREE OF THIS COURT, AND WAS PASSED SOLELY BECAUSE OF SAID ORDER AND DECREE.

(3)

THE SCHEDULE OF TARIFFS FILED BY THE A. C. L. AFTER THE FIRST AND BEFORE THE LAST ORDER OF THE I. C. C. MADE APPLICATION OF RATES FIXED BY THE

I. C. C. HAVE APPLICATION THROUGHOUT THE ENTIRE STATE WHICH WAS CONTRARY TO THE FIRST ORDER OF THE I. C. C. AS CONSTRUED BY THE FIRST DECREE OF THIS COURT AS LIMITING THE APPLICATION OF THE RATES TO SPECIFIED TERRITORY IN FLORIDA.

[fol. 297] (4)

THE FILING OF THIS SCHEDULE OF RATES AND CHARGES FOR SHIPMENTS ACCORDING TO THESE RATES BY THE ATLANTIC COAST LINE RAILROAD COMPANY WERE SOLELY BECAUSE OF THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION AND THE DECREES OF THIS COURT SUSTAINING SAID ORDERS, WHICH ORDERS AND DECREES WERE SET ASIDE BY THE SUPREME COURT OF THE UNITED STATES.

(5)

THE RESTRAINING ORDER OF THE CIRCUIT COURT OF DUVAL COUNTY WAS ISSUED SOLELY BECAUSE OF THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION AND DECREES OF THIS COURT.

(6)

THE RESTRAINING ORDER GRANTED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT ON FEBRUARY 14, 1929, ENJOINING THE ENFORCEMENT OF THE RESTRAINING ORDER OF THE STATE COURT AND OF ORDER 979 WAS GRANTED SOLELY BECAUSE OF THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION AND THE DECREES OF THIS COURT.

(7)

THE MASTER FINDS UNDER THE EVIDENCE THAT THE CUMMER SCALE OF RATES FROM FEBRUARY 8, 1929, TO MARCH 5, 1931, WAS UNREASONABLE AND UNJUST AND DID NOT FURNISH AN ADEQUATE RETURN ON PROPERTIES USED.

[fol. 298] Attached to this report is a statement of amount of overcharges during the period in question as claimed by claimants and admitted by A. C. L. as measured by the difference between amount collected by the A. C. L. and the amount that would have been collected if collections had been made according to the Cummer scale.

Accompanying this report and attached thereto are itemized claims for restitution filed by claimants before September 1, 1931; testimony introduced before the Master at said hearings and pleadings and objections filed before him.

The compensation for taking testimony by stenographers has been paid by the parties to the case.

Hearings were had before the Master in Atlanta, Georgia, in 1932 on January 29 and 30; May 9, 10 and 11, and September 26, 27 and 28; and in Wilmington, N. C., on May 30 and 31.

The time consumed by the Master in hearing testimony and argument of counsel was 10 days, and the time consumed by the Master in considering the record, briefs filed by counsel, making investigations, writing letters and writing report was not less than 16 days, making a total of about 26 days.

Respectfully submitted, Horace M. Holden, Special Master.

[fol. 299] Re Wilson Lbr. Co. of Fla. et al. vs. United States of America et al., Nos. 511, 512, 514

Below appear the names of claimants filing itemized statements of claims and opposite said names appear, respectively, the amounts claimed in next to last column under heading "Amounts Claimed."

In the printed answers of the Atlantic Coast Line Railroad Company the first paragraph thereof is as follows:

"The amount of claimant's claim to the extent of —— dollars represents the difference between the aggregate of the sums collected by this respondent from claimant for the transportation of logs over its lines in Florida at the times mentioned in said claim, and the aggregate of the sums which would have been collected by it for such transportation if the scale of rates known in the record of this cause as the 'Cummer' scale of rates had been applied."

With the exception that an amount is written in each answer between the word "of" and the word "dollars," said amounts above referred to inserted in said answers appear, respectively, opposite said names of claimants in the last column under heading "Amounts in Answers."

Name	Amounts claimed	Amounts in answers
J. Ray Arnold Cypress Company	$2,946.35	$2,944.22
American Hardwood Corporation, by C. B. Benedict, Trustee in Bkcy	3,066.48	3,033.57
Atlantic Hardwood Corporation	2,614.13	2,492.91
Brown Brothers Company, No. 1, by J. B. Adkins, Trustee in Bkcy	414.36	424.10
Brown Brothers Company, No. 2, by J. B. Adkins, Trustee in Bkcy	86.95	86.95
Brown Hardwood Company	93.22	93.22
Brown Investment Company	174.40	174.40
F. S. Buffum & Company	1,644.16	1,644.16
Dense Pine Lumber Company	53.69	53.69
Dowling-Camp Lumber Company	32.34	32.34
The Everglades Cypress Company	4,311.30	4,324.45
Gress Manufacturing Company	321.93	357.21
W. C. Hair, operating as Hair Hardwood Co.	467.48	467.48
Hazzard Brothers	459.25	459.25
Hessler Hardwood Company	902.01	902.01
J. W. Jones Lumber Company	918.09	918.09
Krusen Land & Timber Company	385.64	385.64
Long Leaf Lumber Company	4,384.61	4,384.61
[fol. 300]		
Putnam Lumber Company	10,021.37	9,981.40
Southeastern Hardwood Company, successors to Wilson Land & Timber Co.	1,016.55	1,016.55
Eugene Stacey	117.11	117.11
Eugene Stacey	408.51	408.51
Geo. B. Stallings Company	248.98	153.06
Ben Tillman	54.26	54.26
Thompson-Katz Lumber Company	388.91	388.91
Thompson-Katz Lumber Company	5,225.60	5,225.60
Wilson-Otwell Lumber Corporation	166.30	166.30
	$40,923.98	$40,690.00

Hon. T. T. Turnbull, Attorney for Railroad Commission of Fla., represents the above named claimants.

Cotterill, Hopkins & Ward, Atlanta, August G. Gutheim, Washington, D. C., represent the following parties:

Cummer Cypress Company	$48,791.40	$48,791.40
Wilson Cypress Company	157,310.22	157,149.41

Norman, Quirk & Graham, Louisville, Ky., represent the following party:

Wilson Lumber Company of Florida	41,707.55	41,684.23

Knight, Adair, Cooper & Osborne, Jax., Baker & Baker, represent:

Brooks-Scanlon Corporation	5,883.54	5,631.34
	$294,616.69	$293,946.38

Counsel agreed that correct amounts of said differences are those stated in last column totaling $293,946.23.

Interest on amounts in statements from dates of shipments at rate of eight per cent per annum is claimed.

[fol. 301] [File endorsement omitted.]

[fol. 302] [File endorsement omitted.]

[fol. 303] IN UNITED STATES DISTRICT COURT

[Title omitted]

In Equity. Nos. 511, 512, 514

EXCEPTIONS OF ATLANTIC COAST LINE RAILROAD COMPANY TO THE REPORT OF HORACE M. HOLDEN, SPECIAL MASTER—Filed Nov. 30, 1932

Now comes the Atlantic Coast Line Railroad Company, and excepts to the report of Honorable Horace M. Holden, Special Master, filed in this cause on the 14th day of November 1932, and for cause of exception shows that:

1A. The Master has found at pages 6 and 8, in said report that Order No. 990 of the Florida Railroad Commission (Alston Exhibit No. 3), dated April 20, 1929, "suspending the Cummer scale" of rates (Order No. 979, Alston Exhibit No. 2) for transportation of logs within the State of Florida after those rates had been found by the Interstate Commerce Commission (Alston Exhibit No. 5, Record pages 61-76) to be unreasonable, unjust, and to discriminate against interstate shippers and interstate commerce, was rendered "nugatory and of no force or effect at any time" by reason of a subsequent decision of the United States Supreme Court setting aside the order of the Interstate Commerce Commission (282 U. S. 194); whereas the Master should have found that said Order No. 990 suspending said rates remained in force and effect by its own terms until set aside by Order No. 1032 of the [fol. 304] Florida Railroad Commission (Alston Exhibit No. 4) made on the 5th day of March 1931. (Transcript, pages 5, 11-15 inclusive, 17-20 inclusive, 23, 24, 52, 56, 57, 59, 60, 108. Transcript Hearing Sept. 26-27; pages 3, 4, 22, 38-39 (Adair Stipulation), 41-48 inclusive. Alston Exhibit Nos. 2, 3, 4, 9-12 inclusive).

1B. The said Master has found at page 6 in said report that Order No. 990 of the Florida Railroad Commission (Alston Exhibit No. 3) dated April 20, 1929 "in so far as it may be construed as undertaking to authorize or make valid" certain rates prescribed by the Interstate Commerce Commission for the transportation of logs within Florida, was rendered "nugatory and of no force and effect at any time" by reason of a subsequent decision of the United States Supreme Court setting aside the order of the Interstate Commerce Commission; whereas the said Master should have found that said Order No. 990, remained in full force and effect by its own terms until rescinded by Order No. 1032 of the Florida Railroad Commission (Alston Exhibit No. 4) made on March 5th, 1931. (Transcript, pages 5, 11-15 inclusive, 17-20 inclusive, 23, 24, 52, 56, 57, 59, 60, 108. Transcript Hearing Sept. 26-27, pages 3, 4, 22, 38-39 (Adair Stipulation) 41-48 inclusive. (Alston Exhibit Nos. 3, 4, 9-12 inclusive).

1C. The finding of the Master at page 7 of his report to the effect that "there is nothing in the Order (No. 990) (Alston Exhibit No. 3) to show that it (Florida Commission) had any intention or desire to voluntarily change these rates" is irrelevant, immaterial and unsupported by the evidence; as further cause for exception to this finding, the Atlantic Coast Line Railroad Company says that it is inconsistent with a subsequent finding on the same page to the effect that "the Order (No. 990) was to have the minutes of the Commission show that • • • the rates appearing on the records of the Commission • • • had been [fol. 305] changed"; that said Order No. 990 shows on its face that it was the intention of the Florida Commissioners to suspend the rates "in force and effect • • • on and prior to February 7th, 1929"; that the motives prompting such suspension, and whether or not such suspension was "desired" by the Commission, are immaterial considerations. The Atlantic Coast Line Railroad Company moves that the Master's findings in regard to such should be stricken from his report. (Transcript, pages 15, 20, 60, 62-63 inclusive. Transcript Hearing Sept. 26-27, pages 38-39 (Adair Stipulation), 41-48 inclusive. Alston Exhibits Nos. 9-12 inclusive).

1D. That at page 8 of his report the said Master found that Order No. 990 (Alston Exhibit No. 3) "did not affect

the situation in any respect"; whereas said Master should have found that the said Order had the effect provided for by its terms, to-wit: "the distance scale of commodity rates in force and effect under the authority of the Railroad Commission of the State of Florida on and prior to February 7th, 1929, for the transportation of logs except walnut, cherry and cedar between points on the Atlantic Coast Line in Florida, be and they are hereby suspended." As further cause for exception to said finding the Atlantic Coast Line Railroad Company shows that on January 30th, 1929, the Railroad Commissioners of the State of Florida entered their Order No. 979 (Alston Exhibit No. 2) embodying therein the Cummer Scale of rates for intrastate transportation of logs within the State of Florida in so far as the said scale of rates constituted the basis of any claim pending before the Master; that on the following day, to-wit: January 31st, 1929, the State of Florida, through its Railroad Commission, filed in the Circuit Court of Duval County, a bill (see Record contained in Exhibit No. 5) seeking to compel the Atlantic Coast Line Railroad to put [fol. 306] into effect the rates fixed by said Order No. 979; that the Atlantic Coast Line Railroad Company filed a petition in the said Circuit Court of Duval County, Florida, asking that the case filed therein by the State of Florida be removed to the United States District Court for the Southern District of Florida, which prayer was on February 4th 1929 denied, (Record contained in Exhibit No. 5) and the said Judge of the Circuit Court in and for Duval County, Florida on the same day, to-wit: February 4th, 1929, issued a restraining order enjoining the Atlantic Coast Line Railroad Company from charging any rates for the intrastate transportation of logs except those fixed by Order No. 979; that on February 7th, 1929, the Atlantic Coast Line Railroad Company filed and presented a bill to Honorable William B. Sheppard as Judge of the United States District Court for the Northern District of Florida, praying that the Railroad Commissioners of the State of Florida be restrained and enjoined from putting into effect their Order No. 979 and from penalizing the Atlantic Coast Line Railroad Company for not applying the rates fixed therein; that in said bill the Atlantic Coast Line Railroad Company prayed for an immediate restraining order and

asked that Judge Sheppard call together two other Federal Judges and that the statutory three-judge Court thus organized hear the bill and petitioner's motion for an injunction; that on the motion of the Attorney-General of the State of Florida to dismiss the said bill without calling to his assistance two other judges and to deny the relief prayed for, Judge Sheppard denied all relief sought by the Atlantic Coast Line Railroad Company and dismissed its bill. The Atlantic Coast Line Railroad Company then made motion before the Supreme Court of the United States for leave to file a petition for writ of mandamus [fol. 307] (Alston Exhibit No. 9) requiring the Honorable William B. Sheppard, Judge of the United States District Court for the Northern District of Florida, to revoke his previous order and to call to his assistance two other judges in accordance with the requirements of the Act of Congress in such cases made and provided, and that the Court thus constituted be directed to proceed and hear and determine petitioner's bill. This motion being allowed, the Atlantic Coast Line Railroad Company filed its petition for writ of mandamus (Alston Exhibit No. 9) and the Honorable William B. Sheppard was required by order of the Supreme Court of the United States to show cause why the writ of mandamus should not issue as prayed. Judge Sheppard on April 20th, 1929, made return to the rule to show cause (Alston Exhibit No. 11) and on April 27th, 1929, filed an amended return to the rule to show cause (Alston Exhibit No. 10). In the amended return Judge Sheppard Pleaded that Order No. 990 of the Florida Railroad Commission (Alston Exhibit No. 3) made on April 20th, 1929, suspended all parts of Order No. 979 which were attacked by the Atlantic Coast Line Railroad Company, and that the issues raised in the proceedings instituted in his Court by the Atlantic Coast Line Railroad Company to enjoin the enforcement of Order No. 979 had by reason of said order No. 990 become moot and that the petition of the Atlantic Coast Line Railroad Company for a writ of mandamus directed to him should therefore be dismissed. Order No. 990 and the pleadings filed by Judge Sheppard in the Supreme Court of the United States were prepared by the attorneys for the Railroad Commissioners of Florida and by the attorneys for certain of the claimants in this restitution proceeding. (Transcript Hearing, Sept.

26-27, pages 38-39—Adair Stipulation.) Order No. 990 was made for the purpose of rendering moot the issues in the case pending before Judge Sheppard and to enable him to defeat the mandamus proceeding. The said Order was [fol. 308] presented to the Supreme Court of the United States as a legal order of the Florida Railroad Commission and was presented for the purpose of influencing the action of said Court. By reason of the foregoing facts the Florida Railroad Commission and the claimants herein are now estopped to take the position that Order No. 990 was "nugatory" and "did not effect the situation in any respect." (Transcript, pages 19-24 inclusive, 52, 56, 57, 60-63 inclusive. Transcript Hearing Sept. 26-27, pages 22, 38-39 (Adair Stipulation), 41-48 inclusive, Alston Exhibits Nos. 2, 3, 9-12 inclusive, 14, 15).

1E. The Master at page 8 of his report says of Order No. 990 (Alston Exhibit No. 3) that "if it is in conformity to this order of the Interstate Commerce Commission and the decree of the Court, it is without force or effect as this order (of Interstate Commerce Commission) and decree would be in effect without any assistance from or even acquiescense by the Florida Commission"; whereas said Master should have found that Order No. 990 was made for the purpose of suspending the Florida rates which were in conflict with the rates prescribed by order of Interstate Commerce Commission. (Transcript, pages 5, 15, 17, 19-20, 60. Transcript Hearing Sept. 26-27, pages 22, 38-39 (Adair Stipulation) 42-48 inclusive. Alston Exhibits Nos. 2, 912 inclusive.)

2. The Master has found in said report at page 9 that Order No. 979 of the Florida Railroad Commission (Alston Exhibit No. 2) dated January 30th, 1929, purporting to make intrastate rates on shipments of logs between certain points within the State of Florida conform to the rates between such points which had been prescribed by order of the Interstate Commerce Commission dated August 2nd, 1928, was rendered "nugatory and of no force and effect at any time" by reason of a subsequent decision of the United [fol. 309] States Supreme Court (282 U. S. 194) setting aside the order of the Interstate Commerce Commission; whereas relative to Order No. 979 said Master should have found that said Order from the date of its issuance, to-wit:

January 30, 1929, by its terms became the repository of the Cummer scale of rates in so far as the same constituted the basis of any claim pending before the Master; that Order No. 979 became the subject matter of litigation in the Circuit Court of Duval County, Florida, by bill filed by the State of Florida on the 31st day of January, 1929, seeking to enforce said order; that the State of Florida acted therein through its Railroad Commissioners, its Attorney-General and Special Counsel designated by the Railroad Commissioners; that said Circuit Court of Duval County, upon motion of said parties entered its judgment dated February 4, 1929, which restrained and enjoined the Atlantic Coast Line from enforcing any other rates for transporting logs in Florida except those set out in said Order No. 979; that the State of Florida and its Railroad Commissioners subsequently contended in the United States District Court of the Southern District of Florida, and also in the United States District Court for the Northern District of Florida that said rates were valid; that the Circuit Court of Appeals of the United States for the Fifth Circuit on February 14, 1929 restrained and enjoined the enforcement of said Order No. 979 and of the rates therein mentioned, and also of the order entered in the Circuit Court of Duval County, Florida, and that by reason of such proceedings and injunctions the said Cummer scale of rates was not in force during any of the period involved in the trial before the Master, which period was from February 8, 1929, to March 5th, 1931. (Transcript, pages 15, [fol. 310] 19, 21-24 inclusive, 27, 52. Transcript Hearing Sept. 26-27, pages 38-39 (Adair Stipulation), 41-48 inclusive. Alston Exhibits Nos. 5-8 inclusive.)

3A. The said Master found at page 13 of his report that "the restraining order of the Circuit Court of Duval County, Florida, enjoining the Atlantic Coast Line Railroad Company from charging any rates except those in order 979 was properly granted." To this finding the Atlantic Coast Line Railroad Company excepts on the ground that the subject matter of the suit, in which the said order was granted, was not at any time within the jurisdiction of the Circuit Court of Duval County, Florida, and for the further reason that at the time the order was granted the subject matter of the case had been removed to the District

Court of the United States for the Southern District of Florida. (Alston Exhibit No. 5.)

3B. Said Master found at page 13 of his report as follows:

"The restraining Order was issued solely because of the orders of the Interstate Commerce Commission and decree of this court and though the Interstate Commerce Commission later on February 7th, 1929, amended its previous order clearly making said rates which went into effect February 8th, applicable throughout the State, and notwithstanding the fact that this restraining order of the State was at the time properly granted, the decision of the Supreme Court reversing the decrees of this Court sustaining the orders of the Interstate Commerce Commission and declaring these orders invalid vitiated the restraining order of the State Court in so far as it may be construed as undertaking to make valid any charges or collections according to any rates fixed by any order of the Inter- [fol. 311] state Commerce Commission made by the Atlantic Coast Line Railroad Company during the period in question, to-wit: from February 8th, 1929, to March 5th, 1931, and said restraining order should now be and is declared a nullity and of no force or effect at any time to the same extent that Order 990 in finding number (1) has been declared nugatory."

This finding is assigned as error for the reason that it is inconsistent with the finding of the Master hereinbefore referred to in Exception 3A.

4. The said Master found at page 14 of his report that the restraining order granted by the United States Circuit Court of Appeals for the Fifth Circuit on February 14th, 1929 (Alston Exhibit No. 5), which said order restrained "A. S. Wells, E. S. Matthews and Mamie G. Eaton, and their agents, representatives and attorneys • • • until the further order of this court from enforcing, or undertaking to enforce the said order of the said Railroad Commissioners of the State of Florida, in the cause filed therein by the State of Florida acting through A. S. Wells, E. S. Matthews and Mamie G. Eaton as Railroad Commissioners of the State of Florida, by T. T. Turnbull, Special Counsel-Gen-

eral therein, and by Fred H. Davis, Attorney-General," was rendered "nugatory and of no force and effect at any time" by reason of the subsequent decision of the U. S. Supreme Court setting aside the order of the Interstate Commerce Commission, which said decision of the Supreme Court was rendered on January 9th, 1931, in the case of Florida et al. vs. U. S. et al.; Brooks-Scanlon Corp. et al. vs. United States et al.; Wilson Lumber Company of Florida vs. United States et al., 282 United States 194; whereas the said Master should have held that the restraining order granted by the said Circuit Court of Appeals for the Fifth [fol. 312] Circuit remained in full force and effect by its own terms until dissolved by the subsequent order of the said Circuit Court of Appeals on April 20th, 1931 (Alston Exhibit No. 8), and that, therefore, the said Florida rates known as the Cummer scale of rates were at no time "in force" during the existence of said order, to-wit: February 14th, 1928, to March 20th, 1931. (Transcript, pages 19, 21-23 inclusive, 27, 63, 64, 110. Transcript Hearing Sept. 26-27, pages 38-39 (Adair Stipulation), 42-48 inclusive. Alston Exhibit Nos. 2, 5-8 inclusive.)

5. The Master found at page 16 of his report that the Atlantic Coast Line Railroad Company "does not now hold possession of these collections under any color of authority"; whereas the said Master should have found that the Atlantic Coast Line Railroad Company is legally in possession of the sums collected by it from the claimants for the intra-state transportation of logs during the period from February 8th, 1929, to March 5th, 1931, and which sums claimants are now seeking to recover from it; that its possession of the sums so collected has at all times been lawful, and that it is now entitled to hold the same under its legal right to a reasonable and just rate for its services, which right is guaranteed to it by the Federal Constitution and by the Constitution of the State of Florida. (Transcript, pages 100-131 inclusive, 137-625 inclusive. Transcript Hearing Sept. 26-27, pages 28-38 inclusive.)

6A. The Master at pages 24-27 inclusive, of his report has found that the rates fixed by the order of the Interstate Commerce Commission and the rates fixed by the Cummer scale had been declared invalid and were not the lawful established rates for the intra-state transportation of logs

[fol. 313] in the State of Florida from February 8th, 1929, to March 5th, 1931, and that "no previous rate in force as a matter of law becomes a lawful established rate" for the intra-state transportation of logs within the State of Florida from February 8th, 1929, to March 5th, 1931; whereas said Master should have found that if the Cummer scale of rates was not the lawful scale of rates in Florida for the kind of transportation involved in this case, the Class P scale of rates under the Florida Commission's schedule of rates, and which would have been effective except for these special rates known as the Cummer scale of rates, came back into application, and, therefore, became the lawful scale of rates applicable to such traffic during the period in question. (Transcript, pages 54-55. Transcript Hearing Sept. 26-27, pages 9-28 inclusive.)

6B. The said Master at page 27 ruled "that he is without authority under the order of the Court to make decision as to what should have been proper charges during the period in question and if less than amounts charged to award to claimants the amount of overcharges, if any were thereby shown," but said Master nevertheless finds (p. 26) that "this Court has authority to fix what is a just and reasonable rate to have been charged during the period in question" and (p. 27) "feels that he should make ruling to that effect and has herein made such ruling"; to these latter findings and rulings the Atlantic Coast Line Railroad Company excepts on the ground that it is no part of the Master's duty nor within his power to instruct this Court as to its authority or to make rulings as to the extent of its powers; that such a finding and ruling is plainly outside the scope of the order of reference and foreign to the issues raised by the pleadings since claimants have only asked for [fol. 314] difference between charges exacted and charges that would have been collected under the Cummer scale of rates, and such was the contention of attorneys for claimants in the hearings before the Master. At page 15 of the transcript of the evidence before the Master, one of the attorneys for claimants said that "under the order of this court, appointing your Honor Special Master, directing your Honor to find the amount to which we are entitled to be refunded, measured by the difference between the rate charged under the unlawful order of the Interstate Commerce Commission and what would have been charged

under the established, which means the one established lawful state rate we have shown here, the established lawful State rate during all that time was the Cummer scale of rates * * *" (see also Transcript, page 63). At page 73 of the transcript, in referring to the power of the Court to fix a reasonable rate for the period in question, the same attorney says: "* * * The power and duty of your Honor to make rates is not one that runs with judicial power * * *." At page 32 of the transcript another attorney for the shippers made this contention: "* * * These exhibits if your Honor please go not to the question of what was the established lawful rate but what would be or would have been a lawful rate. It is our position first, that that question was not referred to the Master, and second, that it is a question not within the jurisdiction of the Court itself." For these reasons the Atlantic Coast Line Railroad Company asks that the Master's findings and rulings on this point be stricken from his report. (Transcript, pages 6-17 inclusive, 32-34 inclusive, 69, 73, 123, 124, 126; also Motion for decree in accordance with the mandate and for order of restitution in each case, and especially paragraph II thereof; and objections and reply to answer of Atlantic Coast Line Railroad Company to the several claims, especially paragraph II thereof.)

[fol. 315] 7. That said Master found at page 28 in his report that the report and order of the Interstate Commerce Commission rendered on August 2nd, 1928 (Alston Exhibit No. 5, Record pages 61-76), the report and order made by the Interstate Commerce Commission on February 5th, 1929, clarifying the first mentioned report and order, and the report and order of the Interstate Commerce Commission made on July 5th, 1932 (A. C. L. Exhibit No. 1), were not admissible in evidence in the hearing before him because irrelevant and immaterial; whereas the said Master should have found that each of the said reports and orders was relevant and material to the question of reasonableness or unreasonableness of the Cummer scale of rates and of the rates actually charged and as to whether the Cummer scale of rates discriminated against interstate commerce and the Master should have received in evidence Commission's certified copies of such findings and orders which were offered by the Atlantic Coast Line Railroad Company. (Transcript, pages 5, 6, 17, 19, 48; Tran-

script Hearing Sept. 26-27, pages 2-6 inclusive. Alston Exhibit No. 5 (Record pages 61-76); A. C. L. Exhibit No. 1).

8. The said Master at page 28 of his report found that objections made by the Atlantic Coast Line Railroad Company to evidence introduced by claimants as to rates charged by other carriers for the transportation of logs for period beginning in the year 1932 should be overruled and did overrule the same; whereas said Master should have sustained said objections for the reason that the period during which the reasonableness of the Florida rates was in question ended in March, 1931, about eighteen (18) months prior to the time to which claimants' evidence referred. The objections herein referred to were duly made in writing by the Atlantic Coast Line Railroad Company [fol. 316] and were filed with the Master. (Transcript Hearing Sept. 26-27, pages 28 to 36 inclusive.)

9. To findings of fact Nos. 1, 2, 5 and 6 made by the Master and set forth in pages 29 and 30 of his report, which findings of fact are embodied in general findings of the Master on pages 6, 9, 13 and 14 respectively of his report, the Atlantic Coast Line Railroad Company excepts for the same reasons which have already been given as grounds for exceptions to the general findings. These exceptions to findings of fact Nos. 1, 2, 5 and 6 are noted in Exceptions Nos. 1A to 1E inclusive, 2, 3, and 4 respectively hereinbefore set forth.

Having excepted to the above mentioned findings and rulings of the Special Master, the Atlantic Coast Line Railroad Company prays that each and all of its exceptions be sustained. The Atlantic Coast Line Railroad Company prays further that the findings made by the Special Master to the effect that the Cummer scale of rates was unreasonable and unjust and did not furnish an adequate return on properties used and therefore was not the lawful established scale of rates from February 8th, 1929, to March 5th, 1931, be sustained, and that a decree be entered in this case denying the right of the claimants and intervenors to have restitution or recover any sum from the Atlantic Coast Line Railroad Company.

Nov. 30, 1932.

Carl H. Davis, W. E. Kay, Alston, Alston, Foster & Moise, Attys. for A. C. L. R. R. Co.

[fol. 317] IN UNITED STATES DISTRICT COURT

In Equity. No. 514

[Title omitted]

MOTION TO SET ASIDE REPORT OF SPECIAL MASTER—Filed Dec. 3, 1932

To the Honorable Judges of the District Court of the United States In and For the Northern District of Georgia, Atlanta Division:

Comes now the State of Florida and E. S. Matthews, Mamie Eaton-Greene and Tucker Savage as and constituting Florida Railroad Commission, and show unto the Court:

1. That on the 14th day of November, A. D. 1932, the Honorable Horace M. Holden, heretofore appointed as Special Master in this cause, filed his report in this cause, all of which more fully appears from the report of said Master now on file in this cause, reference to said report being hereby prayed.

2. That said Master failed to do each and every the following things, viz:

(a) He failed to afford this movant an opportunity to make or file with or before said Master exceptions or objections to the said report, prior to the time that said report was signed or settled by said Master and filed in this cause.

[fol. 318] (b) He failed to fix a time at which this movant might attend before him and inspect his said report and make and file exceptions or objections thereto or to suggest changes therein.

(c) He failed to notify this movant before he had signed and settled his report that a draft of his report was ready to be signed and settled and filed, or otherwise to notify this movant of the completion of the settling, signing and filing of said report in such manner as to afford this movant an opportunity to make and file its exceptions and objections to said report with and before him prior to the time of the filing thereof.

(d) He failed to serve upon this movant prior to the time that he signed, settled and filed his said report a tentative draft of his said report or to afford to this movant an opportunity to attend before him and inspect his said report and to make and file exceptions and objections thereto.

3. This movant avers that it desires to make exceptions and objections to the report of said Master and to divers of the findings of law and fact therein contained, and that this movant has in no wise waived or intended to waive the right of filing exceptions or objections with and before said Master to said report of said Master.

4. And this movant moves the Court to set aside the report of said Master and/or refer back the same to the Master with directions to proceed in accordance with the rules [fol. 319] and practice of this Court to the end that this movant may be afforded a reasonable opportunity to make and file exceptions and objections to said report with and before said Master, and may be afforded a reasonable opportunity to be heard thereon by said Master, all in accordance with the practice obtaining in the equity Courts of the United States and in accordance with the practice laid down by the Supreme Court of the United States.

The State of Florida, Florida Railroad Commission, Cary D. Londis, Attorney General. T. T. Turnbull, Special Counsel.

[Similar motion filed in two constituent causes omitted in printing.]

[fols. 320-324] [File endorsement omitted.]

[fol. 325] IN UNITED STATES DISTRICT COURT

In Equity. No. 511

[Title omitted]

EXCEPTIONS OF PETITIONERS TO THE REPORT OF THE SPECIAL MASTER—Filed Dec. 5, 1932

Come now petitioners, Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company, jointly and severally, and by their respective undersigned

solicitors except jointly and severally to the report of the Honorable Horace M. Holden, Special Master herein, filed in the office of the Clerk of the above entitled Court on the 14th day of November, A. D. 1932, in the following particulars severally, to-wit, each such exception being directed not only to the finding or part thereof to which it is addressed, but also to all of the several matters and things set forth in said report in support of or relating to such finding or part thereof.

[fol. 326] First Exception

Petitioners jointly and severally except to all parts of Finding of Law numbered 6 of said report (on pages 15 and 16 of said report), except such parts thereof as find that the Court has the right and owes the duty to order restitution in proceedings of this kind, and that under the facts in this case the Court has no discretionary power to deny restitution. And as grounds and particulars of said exception the petitioners aver the following grounds and particulars severally:

(a) That the portion of said Finding so excepted to as aforesaid is contrary to law.

(b) The order of the Interstate Commerce Commission sustained by the decree of this Court was not set aside on procedural grounds as set forth in said Finding, but on the contrary the said order of said Interstate Commerce Commission was set aside by the Supreme Court of the United States, "for the lack of the basic or essential findings required to support the Commission's order", and said order can give the Atlantic Coast Line Railroad Company no aid or protection.

(c) In restitution proceedings as here, consequent upon the reversal of an erroneous final decree the sole question is the amount and restoration of the benefits which have been received by reason of the failure of the Court to enter the right decree in the first instance; but even if this were a new and independent suit brought in Florida to recover from the Railroad Company the benefits which it has enjoyed as aforesaid, the Cummer Scale would conclusively be the measure of the recovery.

[fol. 327] (d) The motion for restitution makes neither a new issue nor a new case, nor has the Atlantic Coast Line Railroad Company the right in restitution proceedings consequent upon the reversal of a final decree, to inject a new issue or to relitigate a former one.

(e) It is the duty of this Court while it has the parties before it to require the Atlantic Coast Line Railroad Company to restore to petitioners the benefits which it has enjoyed by reason of the failure of this Court to enter in the first instance the decree which the Supreme Court of the United States has now said that this Court should then have entered, and this Court has no jurisdiction in this cause to take any action other than to require such restoration.

(f) The fact that the sums of which restitution is now sought may have been collected by the Atlantic Coast Line Railroad Company in good faith or under color of authority or under a bona fide claim of right, is immaterial and irrelevant in this proceeding, in that such charges were made solely under color and by reason of the invalid order of the Interstate Commerce Commission, as sustained by the erroneous decree of this Court, and by reason of the failure of this Court to enter the right decree in the first instance. And this Court has no authority to allow a party to retain either part or all of any sums received under such circumstances.

[fol. 328] (g) This specially constituted statutory Court constitutes a part of the Federal governmental machine charged by Congress with the duty of determining at the instance of the State or the citizen the validity or invalidity of the affirmative exercise of Federal power in and by orders of the Interstate Commerce Commission; that the final decree and opinion of this statutory Court while in form negative, in effect were affirmative, in that the same affirmatively found that the part of the order of the Interstate Commerce Commission which was assailed to be valid, and sustained the affirmative exercise of Federal power by the Interstate Commerce Commission, with the result that the Railroad Company received benefits for which restitution ought to be computed and made upon the basis of the difference between the rate prescribed by the unlawful order of the Interstate Commerce Commission and the Cummer Scale.

(h) The Master should have found that the Cummer Scale of rates was and is the basis to be employed in computing the restitution to be made herein.

Second Exception

The petitioners jointly and severally except to Finding of Law numbered 7 of said Report (page 17 of said Report), and each and every part thereof save such portion thereof as declares that no change has been made by the Florida Railroad Commission in the Cummer Scale of rates and that [fol. 329] no application for a change of said rates has been made by said Atlantic Coast Line Railroad Company to said Railroad Commission. And as grounds and particulars of said exception the petitioners aver the following grounds and particulars severally:

(a) That the portion of said Finding as so excepted to as aforesaid is contrary to law.

(b) Upon the grounds hereinafter set forth after the exception to Finding of Law numbered 7-B.

Third Exception

Petitioners jointly and severally except to Finding of Law numbered 7-A of said report (page 17 of said report) and each and every part thereof. And as grounds and particulars of said exception the Petitioners aver the following grounds and particulars severally:

(a) That said Finding is contrary to law.

(b) Upon the grounds hereinafter set forth after the exception to Finding of Law numbered 7-B.

Fourth Exception

The petitioners jointly and severally except to Finding of Law numbered 7-B (pages 18 and 19 of said report), and each and every part thereof. And as grounds and particulars of said exception the petitioners aver the following grounds and particulars severally:

[fol. 330] (a) That said Finding is contrary to law.

(b) Upon the grounds hereinafter made applicable to Findings numbered 7, 7-A and 7-B, viz.:

Grounds Applicable Severally and Distributively to Findings of Law Numbered 7, 7-A and 7-B of Said Report (Pages 17, 18 and 19 of Said Report), Jointly and Severally

(c) Neither these petitioners nor the Florida Railroad Commission in the proceedings before the Interstate Commerce Commission were making opposite contentions from the Atlantic Coast Line Railroad Company. The Railroad Company was defendant in that proceeding. Its answer before the Interstate Commerce Commission denied that there was any violation on its part of the Interstate Commerce Act, and prayed in its answer "that it be hence dismissed." During the course of the proceedings the Railroad Company expressly disclaimed any contention that the Cummer Scale of rates was not compensatory and during such proceedings and at the conclusion of the hearings thereon stated as its position that it had not made and was not making any proposal to revise those rates (Tr., hearing Jacksonville, 1/20/27, page 904; hearing, Atlanta, 12/3/31, Perrin, pp. 48, 49; hearing Atlanta, 5/9/32, Perrin, pp. 241, 242). The first report of the Interstate Commerce Commission which was stricken down by the Supreme Court of the United States, so stated. The Railroad Company at no time expressed dissatisfaction with or desire to change the Cummer Scale until long after the order of the Interstate Commerce Comission had been entered and after the first decree of this Court in this proceeding, viz., March 7th, 1929, when it intervened in defense of the amended order of the Interstate Commerce Commission.

[fol. 331] (d) The Florida Railroad Commission has constantly asserted its own jurisdiction and denied the jurisdiction of the Interstate Commerce Commission over the intrastate rates, and the Supreme Court of the United States in this very proceeding has sustained its contention. There is no basis for the statement by the Master that it would have been useless or futile for the Atlantic Coast Line Railroad Company to have made application to the Florida Railroad Commission for a change of the Cummer Scale. The Florida Railroad Commission filed no proceedings before the Interstate Commerce Commission. It appeared in defense of its rates and it stated in so doing that its doors had been open for years to any complaint which

the Atlantic Coast Line Railroad Company might make, but that none had been made down to that very day (Tr. Jacksonville hearing Wells, 1/19/27, pp. 668 to 670).

(e) The Atlantic Coast Line Railroad Company at no time during the period of the proceeding before the Interstate Commerce Commission or prior thereto or subsequent thereto charged or attempted to charge or proposed to charge for the transportation of logs in Florida any scale of rates other than the Cummer Scale, except under and in compliance with or under color of the invalid order of the Interstate Commerce Commission, as sustained by the erroneous decree of this Court, and then only after the first decree of this Court had been entered.

[fol. 332] (f) The Supreme Court of the United States in this case found that the reasonableness of the Cummer Scale lay with state authority and not with the Interstate Commerce Commission. The unreasonableness and unjustness of the Cummer Scale were not in issue before the Interstate Commerce Commission, were beyond the scope of its authority, and were matters peculiarly for the determination of the Florida Railroad Commission, and the Supreme Court of the United States so found in this proceeding.

(g) Nothing set forth in said finding offers any excuse to the Atlantic Coast Line Railroad Company for not making application to the Florida Railroad Commission.

(h) The reliance by the Atlantic Coast Line Railroad Company upon the invalid order and erroneous decree of this Court can avail it nothing in this proceeding. In no sense can the proceedings in this case constitute an application by the Atlantic Coast Line Railroad Company to the Florida Railroad Commission for anything.

(i) The Supreme Court of the United States in this suit found in effect that the reasonableness and justness of the Cummer Scale per se lay with the state authorities, viz., with the Florida Railroad Commission; the Master should have found that the Cummer Scale having been voluntarily initiated by the Railroad Company and adopted by the Florida Railroad Commission and become prior to the commencement of this suit the lawful state rate, established by the Florida Commission, binding alike upon the shipper

and the carrier and that the reasonableness and justness [fol. 333] of such rate could not be brought into question with respect to any transaction between shipper and carrier except with respect to the future and then only after a hearing upon the reasonableness and justness of such rate after application by the Railroad Company and notice to all interested parties.

(j) The Master should have found that the reasonableness or unreasonableness, justness or unjustness of the Cummer Scale is not open to inquiry in these restitution proceedings.

Fifth Exception

The petitioners jointly and severally except to each and every part of Finding of Law numbered 8 (on pages 20 and 21 of said Report). And as grounds and particulars of said exception the petitioners aver the following grounds and particulars severally:

(a) That said Finding is contrary to law.

(b) This specially constituted statutory Court is without jurisdiction to determine the reasonableness or unreasonableness, justness or unjustness of the Cummer Scale of rates in this proceeding for restitution.

(c) A Federal Court of plenary jurisdiction would be without the jurisdiction to apply retroactively the arrestive power and strike down retroactively a rate maintained in a state by and under authority of the state. The Cummer Scale of rates was voluntarily initiated by the Railroad [fol. 334] Company more than fifteen years prior to the entry of the unlawful order of the Interstate Commerce Commission, and during all that time was voluntarily maintained for the transportation of logs intrastate in Florida, and long prior to such order was duly adopted by the Florida Railroad Commission as the lawful state rate, and under the laws of Florida and the rules of the Florida Railroad Commission all parties are and were conclusively bound thereby with respect to all transactions in the past.

(d) The motion for restitution makes neither a new issue nor a new case nor has the Railroad Company the right in

these restitution proceedings consequent upon the reversal of a final decree to inject a new issue or to relitigate a former one.

(e) This proceeding is a restitution proceeding consequent upon the reversal of a final decree. The charges made by the Atlantic Coast Line Railroad Company were made solely under color of the invalid order of the Interstate Commerce Commission as sustained by the erroneous decree of this Court and by reason of the failure of this Court to enter the right decree in the first instance (Perrin testimony, Atlanta hearing 12/29/31, p. 30; 9/26/32, p. 26). The effect of the eighth Finding of Law is to suffer the Railroad Company to interpose in this restitution proceeding a new defense where the sole function and duty of the Court is to require the restoration by the Railway Company of the benefits which it has enjoyed by reason of the failure of this Court to enter the right decree in the first instance.

[fol. 335] (f) The Master should have found that the reasonableness or unreasonableness, justness or unjustness of the Cummer Scale is immaterial and irrelevant in this proceeding.

(g) The Master should have found that the Cummer Scale was the lawful established rate from February 8th, 1929 to March 5th, 1931, and constitutes the measure of restitution to be made to these petitioners.

(h) The Master should have found that the Cummer Scale, having been voluntarily initiated by the Railroad Company and adopted by the Florida Railroad Commission as part of its schedule of rates, became long prior to the commencement of this suit and thenceforward was "the lawful established rate", and that the reasonableness and justness of such rate cannot be brought into question in this proceeding with respect to any past transactions between shipper and carrier.

Sixth Exception

The petitioners jointly and severally except to Finding of Fact numbered 9 of said Report (on page 22 of said Report) and each and every part thereof. And as grounds and particulars of said exception the petitioners aver the following grounds and particulars severally:

(a) That said Finding was and is beyond the jurisdiction and power of the Master or this Court to make.

[fol. 336] (b) The Master should have found as a matter of law that the Cummer Scale was and constituted the measure of the restitution to be made to these Petitioners and should have sustained all objections interposed to the introduction of all testimony and evidence introduced for the purpose of showing that the Cummer Scale was unjust and unreasonable.

(c) Upon the grounds hereinafter set forth after the exception to Finding of Law numbered 9-A.

(d) Reserving their respective rights under grounds (a), (b) and (c) above, the Petitioners aver that the said Finding is contrary to the evidence.

Seventh Exception

The petitioners jointly and severally except to Finding of Law numbered 9-A of said report (on pages 22 and 23 of said report), and each and every part thereof. And as grounds and particulars of said exception and petitioners aver the following grounds and particulars severally:

(a) That said Finding is contrary to law.

Grounds Applicable Severally and Distributively to Finding of Fact Numbered 9 and Finding of Law Numbered 9-A of Said Report (on Pages 22 and 23 of Said Report), Jointly and Severally

(b) That the Master should have found as a matter of law that the Cummer Scale was the established lawful rate from February 8th, 1929, to March 5th, 1931.

[fol. 337] (c) That neither this specially constituted statutory Court nor its Master has jurisdiction to inquire into or receive evidence upon the reasonableness or unreasonableness, justness or unjustness of the Cummer Scale of rates.

(d) The Cummer Scale of rates was voluntarily initiated by the Railroad Company nearly fifteen years prior to the entry of the unlawful order of the Interstate Commerce Commission, and during all that time was voluntarily main-

tained for the transportation of logs intrastate in Florida, and long prior to such order was duly adopted by the Florida Railroad Commission as the lawful state rate, and under the laws of Florida and the rules of the Florida Railroad Commission all parties are and were conclusively bound thereby with respect to all transactions in the past.

(e) The Mast should have found that the reasonableness or unreasonableness, justness or unjustness of the Cummer Scale is not open to inquiry in these restitution proceedings.

(f) The Master should have found that the Cummer Scale having been voluntarily initiated by the Railroad Company and adopted by the Florida Railroad Commission as part of its schedule of rates became long prior to the commencement of this suit and thenceforward was "the lawful established rates," and that the reasonableness and justness of such rate cannot be brought into question in this proceeding with respect to any past transactions between shipper and carrier.

[fol. 338] (g) The Master having found in effect that the Cummer Scale of rates was the established lawful rate prior to February 8th, 1929, the Master should have found that this Court is without jurisdiction and power to determine whether such scale of rates was in violation of the statutes or Constitution of the State of Florida or the Constitution of the United States because unjust or unreasonable.

(h) The Master should have found that the Cummer Scale was the established lawful rate from February 8th, 1929, to March 5th, 1931, and constituted the measure of the restitution to be made to these petitioners.

Eighth Exception

The petitioners jointly and severally except to so much of Finding of Law numbered 10 (on page 24 of said report) as recites or implies that the said Cummer Scale was invalid at any time or for any period. And for grounds and particulars of said exception the petitioners aver the following grounds and particulars severally:

(a) That the portion of said Finding so excepted to as aforesaid is contrary to law.

(b) That the Master should have found that the Cummer Scale was the established lawful rate from February 8th, 1928, to March 5th, 1931.

(c) That the Master should have found that the petitioners are entitled to restitution upon the basis of the Cummer Scale.

[fol. 339] Ninth Exception

The petitioners jointly and severally except to Finding of Law numbered 10-A (pages 24 to 27 inclusive of said report), other than such portions thereof as finds that the rates charged by the Atlantic Coast Line Railroad Company during this period were charged without any lawful authority. And as grounds and particulars of such exception these petitioners assert and aver the following grounds and particulars severally;

(a) That said Finding is contrary to law.

(b) That the Master should have found that neither the Master nor this Court has any authority or jurisdiction to inquire into the reasonableness or justness of the Cummer Scale.

(c) This Court has no jurisdiction to strike down a rate prescribed by the Florida Railroad Commission and maintained under authority of the State of Florida, and has no jurisdiction or power to substitute retroactively for such rates other rates that this Court might prescribe as just and reasonable.

[fol. 340] (d) There is and can be no burden upon these petitioners to show that the rate charged by the Railroad Company solely under color of the invalid order of the Interstate Commerce Commission as sustained by the erroneous decree of this Court was unreasonable, as a condition to receiving restitution at the hands of this Court.

(e) The Master having found that the Cummer Scale was the established scale of rates in Florida from February 8th, 1929, to March 5th, 1931, should have found that this Court is without jurisdiction to determine whether such rates were in conflict with the laws or Constitution of Florida.

(f) The Master should have found that it was and is the duty of this Court while it has the parties before it to require the Atlantic Coast Line Railroad Company to restore to Petitioners the benefits which it has enjoyed by reason of the failure of this Court to enter in the first instance the decree which the Supreme Court of the United States has now said that this Court should then have entered, and this Court has no jurisdiction in this cause to take any action other than to require such restoration.

(g) Ths finding is based upon an erroneous premise of law, in that it assumes that this Court has the power to determine and consider with respect to past transactions the reasonableness and justness of the Cummer Scale of rates. If this Court has the jurisdiction and power to consider and determine the reasonableness or unreasonable-
[fol. 341] ness of the Cummer Scale as applied to past transactions then of course this Court has the jurisdiction and power to determine what would be a reasonable rate with respect to such past transactions, but this Court has no such jurisdiction or power in the first instance and the measure of the restitution to be made in these proceedings is the Cummer Scale, and the Master should have so found.

Tenth Exception

These petitioners jointly and severally except to so much of Finding of Law numbered 11 (on page 28 of said report) as may be construed to find that the pleadings and evidence before this Court on the final hearing and rehearing of this cause were and are not before the Master as evidence insofar as it is relevant, material and competent in these proceedings and within the jurisdiction of this Court and the scope of said order of reference. And as grounds and particulars of said exception these petitioners aver the following grounds and particulars severally:

(a) That the portion of said Finding so excepted to as aforesaid is contrary to law.

[fol. 342] Eleventh Exception

The petitioners jointly and severally except to all parts of Finding of Law numbered 12 (on page 28 of said report), except so much thereof as overrules objections made by the Railroad Company to evidence introduced by certain claimants as to rates charged by other carriers for the trans-

portation of logs, and Petitioners especially except to so much of said finding as overrules the objections made by these Petitioners to testimony and evidence offered by the Atlantic Coast Line Railroad Company for the purpose of showing that the Cummer Scale would be unreasonable or unjust and all evidence introduced by the Railroad Company as to what was a reasonable and just rate for the transportation of the subject matter of these restitution proceedings. And as grounds and particulars of said exception these petitioners aver the following grounds and particulars severally:

(a) That the portion of said Finding so excepted to as aforesaid is contrary to law.

(b) The Master should have found that the reasonableness or unreasonableness, justness or unjustness of the Cummer Scale was not open to inquiry in these restitution proceedings.

(c) The Master should have found that the Railroad Company in this proceeding is precluded from showing or attempting to show that the Cummer Scale of rates is unjust or unreasonable since the Master found that the Cummer Scale was the established rate applicable in Florida during the period here involved.

[fol. 343] (d) The Master should have found that it was and is the duty of this Court while it has the parties before it to require the Atlantic Coast Line Railroad Company to restore to petitioners the benefits which it has enjoyed by reason of the failure of this Court to enter in the first instance the decree which the Supreme Court of the United States has now said that this Court should then have entered, and this Court has no jurisdiction in this cause to take any action other than to require such restoration.

(Note: The objections and exceptions were duly taken of record in limine to all the testimony and evidence offered by the Atlantic Coast Line Railroad Company upon the justness or unjustness, reasonableness or unreasonableness of the Cummer Scale.)

Twelfth Exception

The petitioners jointly and severally except to Finding of Fact numbered 7 (on page 30 of said report) and each

and every part thereof. And as grounds and particulars of said exception the petitioners aver the following grounds and particulars severally:

(a) That said Finding is contrary to law.

(b) That said Finding was and is beyond the jurisdiction and power of the Master or this Court to make.

[fol. 344] (c) The Master should have found as a matter of law that the Cummer Scale was and constituted the measure of the restitution to be made to these Petitioners and should have sustained all objections interposed to the introduction of all testimony and evidence introduced for the purpose of showing that the Cummer Scale was unjust and unreasonable.

(d) That the Master should have found as a matter of law that the Cummer Scale was the established lawful rate from February 8th, 1929, to March 5th, 1931.

(e) That neither this specially constituted statutory Court nor its Master has jurisdiction to inquire into or receive evidence upon the reasonableness or unreasonableness, justness or unjustness of the Cummer Scale of Rates.

(f) The Cummer Scale of rates was voluntarily initiated by the Railroad Company nearly fifteen years prior to the entry of the unlawful order of the Interstate Commerce Commission, and during all that time was voluntarily maintained for the transportation of logs intrastate in Florida, and long prior to such order was duly adopted by the Florida Railroad Commission as the lawful state rate, and under the laws of Florida and the rules of the Florida Railroad Commission all parties are and were conclusively bound thereby with respect to all transactions in the past.

(g) The Master should have found that the reasonableness or unreasonableness, justness or unjustness of the Cummer Scale is not open to inquiry in these restitution proceedings.

[fol. 345] (h) The Master should have found that the Cummer Scale of rates having been voluntarily initiated by the Railroad Company and adopted by the Florida Railroad Commission as part of its schedule of rates and become long prior to the commencement of this suit and thenceforward was "the lawful established rate," and that

the reasonableness and justness of such rate cannot be brought into question in this proceeding with respect to any past transactions between shipper and carrier.

(i) The Master having found in effect that the Cummer Scale of rates was the established lawful rate prior to February 8th, 1929, this Court is without jurisdiction and power to determine whether such scale of rates was in violation of the statutes or Constitution of the State of Florida or the Constitution of the United States because unjust or unreasonable.

(j) The Master should have found that the Cummer Scale was the established lawful rate from February 8th, 1929, to March 5th, 1931, and constituted the measure of the restitution to be made to these petitioners.

(k) Reserving their respective rights under grounds (a), (b), (c), (d), (e), (f), (g), (h), (i) and (j) above, the petitioners aver that the said Finding is contrary to the evidence.

[fol. 346] Thirteenth Exception

And the petitioners jointly and severally further except to the report of said Master in that this Court by its former orders has found that these petitioners and each of them were and are entitled to restitution, and the said Master ought to have found that the sums severally to be restored to your petitioners respectively should be measured by the difference between the amounts charged and collected by the Railroad Company for the transportation of logs of the tariff description in question under the unlawful order of the Interstate Commerce Commission as sustained by the erroneous decree of this Court on the one hand, and the Cummer Scale on the other hand, together with interest at the rate of 8% per annum computed on such sums respectively from the day that each shipment was made by your petitioners respectively, as aforesaid.

Having excepted as aforesaid, your petitioners jointly and severally pray that each and all of their several exceptions be sustained, and that this Court do make and enter herein a decree adjudging that these petitioners and each of them were and are entitled to restitution and that the sums severally to be restored to your petitioners respec-

tively should be measured by the difference between the amounts charged and collected by the Railroad Company for the transportation of logs of the tariff description in question under the unlawful order of the Interstate Com-
[fol. 347] merce Commission as sustained by the erroneous decree of this Court, on the one hand, and the Cummer Scale on the other hand, together with interest at the rate of 8% per annum computed on such sums respectively from the day that each shipment was made by your petitioners, respectively, as aforesaid, and that this Court do forthwith re-refer the said cause to said Master with directions to calculate the sums severally to be restored to your petitioners respectively as aforesaid on the basis aforesaid, and to report the same to this Court with all convenient speed.

August G. Gutheim, C. E. Cotterill, R. A. Baker, E. W. Mitchell, H. P. Adair, C. G. Ashby, Solicitors and of Counsel for Petitioners.

[fol. 348] [File endorsement omitted]

[fol. 349] IN UNITED STATES DISTRICT COURT

In Equity. No. 512

[Title omitted]

EXCEPTIONS OF COMPLAINANT TO THE REPORT OF THE SPECIAL MASTER, HORACE M. HOLDEN, FILED HEREIN ON NOVEMBER 14, 1932—Filed Dec. 5, 1932

Comes complainant, Wilson Lumber Company of Florida, by counsel, and objects and excepts to the report of the Special Master, Horace M. Holden, filed herein on the 14th day of November, 1932, in the following particulars, to-wit, each such exception being directed not only to the finding to which it is addressed but also to the several matters and things set forth in said report in connection with or related to such finding or in support thereof.

First Exception

Complainant objects and excepts to the finding of the Special Master in "Findings of Law" numbered (6) in

his report and especially so much thereof as finds that this Court has authority to allow one, from whom restitution is sought, to defend against claim for restitution by showing a right to retain part or all of the overcharges made, where said overcharges were made by reason of the erroneous decision of this Court, and the Complainant asserts and avers the following grounds for such exception:

[fol. 350] (a) That said finding is contrary to law.

(b) That this Court, before referring this cause to said Special Master had itself ordered restitution and fixed the measure of it as "the difference between the amount collected and the established lawful rate in force at the time each shipment was made as the Master may find it to have been."

(c) That it is the duty of this Court to right the wrong which has been done by reason of its failure to enter, in the first instance, the decree which the Supreme Court of the United States has now said that this Court should have then entered, and this Court has no jurisdiction in this cause save to require that each party pay back to each other party any and all sums which may have been collected by reason of the erroneous order of this Court.

(d) That said finding is based upon the erroneous theory that the Atlantic Coast Line, in these restitution proceedings has the right to assert any defenses of law or fact that could be asserted in a new and independent suit not connected with restitution but involving the independent determination of the rights of the parties to the subject matter of such suit, and such theory is contrary to the decisions of the Supreme Court of the United States in restitution suits and contrary to the law applicable to restitution.

(e) That it is immaterial and irrelevant in this proceeding whether the sums, of which restitution is now sought, were collected by the Atlantic Coast Line Railroad Company in good faith or under cover of authority because such charges were collected solely by reason of the invalid order of the Interstate Commerce Commission and the erroneous failure of this court to enjoin the enforcement of such order and for no other reason and by no other authority.

(f) This proceeding for restitution differs wholly from a new, separate or independent suit in which the rights of the parties to the sums here in controversy might be deter- [fol. 351] mined since this proceeding for restitution presents no question as to the rights of the parties to the sums in controversy but only the question as to what sums were exacted by one party of another by reason of the void order of the Interstate Commerce Commission which this Court erroneously failed to enjoin and set aside.

(g) The grounds upon which the order of the Interstate Commerce Commission, sustained by this court, was set aside by the Supreme Court can have no bearing upon the question of restitution here presented, it being sufficient that the Supreme Court held said order to be void and that this Court should have enjoined its enforcement.

Second Exception

Complainant objects and excepts to "Finding of Law" numbered (7), except so much thereof as declares that no change has been made by the Florida Railroad Commission in the Cummer Scale of rates and no application for change of said rates has been made by the Atlantic Coast Line Railroad Company to said Commission, and especially excepts and objects to so much of said "Finding of Law" numbered (7) as holds that the Atlantic Coast Line is not precluded in this restitution proceeding from resisting motion for restitution "by showing that the Cummer Scale of rates is invalid because unjust and unreasonable, • • •" and as grounds for such exception and objection the complainant asserts and avers the following:

(a) That the finding is contrary to law.

(b) That said finding is based upon the erroneous theory that in this restitution proceeding the question of the validity or invalidity of the Cummer Scale of rates may be determined by this Court.

(c) That said finding is based on the erroneous theory that in this restitution proceeding this Court may undertake to determine whether the rates that would have been [fol. 352] charged this complainant but for the erroneous order of this Court, were unjust or unreasonable and that neither the laws of Florida prescribing such rates, nor the

principles governing restitution proceedings are sufficient to prevent this Court entering upon such an inquiry.

(e) Upon the grounds hereinafter set forth under the exceptions to "Findings of Law" numbered (7-a) and (7-b).

Third Exception

Complainant objects and excepts to the findings of the Special Master in "Finding of Law" numbered (7-a) and (7-b) and complainant asserts and avers the following grounds for such exceptions:

(a) That said finding is contrary to law.

(b) That said findings are based on the erroneous theory that the question of the amount of restitution to be awarded herein can be affected by the fact as to whether the Atlantic Coast Line Railroad applied to the Florida Commission to change the Cummer Scale of rates, or, having failed so to do, is excused therefrom by reason of the circumstances here existing.

(c) The Master, having found that the Cummer Scale was in effect in Florida during the period here involved, it is immaterial whether the Atlantic Coast Line Railroad might have or should have applied to the Florida Railroad Commission to change such scale.

(d) The Master, having held that the Cummer Scale of rates was in effect in Florida during the period involved, should have held that the question as to whether such scale of rates was unjust or unreasonable was not for determination by this Court in this proceeding, and that the Atlantic Coast Line Railroad is precluded from here bringing into issue any question as to the justice or reasonableness of such rates.

[fol. 353] (e) Because the Master should have further held that under the laws of Florida the rates in force and effect under authority of the Florida Railroad Commission have the force and effect of a statute and can be changed only by application to the Florida Commission and after due notice and hearing thereon.

(f) Because the Master should have held that the unreasonableness and unjustness of the Cummer Scale were not

in issue before the Interstate Commerce Commission since the Supreme Court of the United States in this case found that the question of the reasonableness of the Cummer Scale lay with the Florida Railroad Commission and not with the Interstate Commerce Commission.

(g) Because the Master should have held that the Atlantic Coast Line Railroad, in this proceeding, is precluded from showing or attempting to show that the Cummer Scale of rates is invalid upon any ground or for any reason since the Master found that the Cummer Scale of rates were the lawfully established rates applicable in Florida during the period here involved.

Fourth Exception

Complainant objects and excepts to the finding of the Special Master in "Finding of Law" numbered (8) that "the A. C. L. in resisting the motion for restitution has the right in this proceeding to show that the Cummer Scale of rates were not the lawful established rates from February 8, 1929, to March 5, 1931, because they were unreasonable and unjust in violation of the Statutes of Florida and because they did not furnish an adequate return on properties used and were confiscatory in violation of the due process clause of the Constitution of Florida and the Constitution of the United States and in violation of the Equal Protection Clause of the latter."

[fol. 354] Complainant asserts and avers the following grounds for such exceptions:

(a) That said finding is contrary to law.

(b) Because in this proceeding for restitution this Court is without jurisdiction to determine the reasonableness or unreasonableness of the Cummer Scale of rates, it having been found that the Cummer Scale of rates were the lawfully established rates in the State of Florida during the period in which rates in excess thereof were collected by the Atlantic Coast Line Railroad under the sole authority of the void order of the Interstate Commerce Commission and the erroneous order of this Court in refusing to enjoin the enforcement of such order.

(c) A court of original jurisdiction over the subject matter thereof would be without jurisdiction to apply retro-

actively a rate different from that maintained in a State by and under authority of the State.

(d) The inquiry here is limited to the ascertainment of the amount which the Atlantic Coast Line Railroad Company collected from this complainant by reason of the failure of this Court to enter the right decree in the first instance and this Court has no jurisdiction in this cause save to require that the Atlantic Coast Line Railroad Company pay back to this complainant, and others, such sums as it may have collected by reason of the erroneous order of this Court and it being established what sums were collected, the sole inquiry is as to what sums *would* have been collected, not what sums *should* have been collected, had this Court entered the right decree in the first instance.

(e) The Master should have found that the Cummer Scale of rates, being the lawfully established scale of rates under authority of the State of Florida from February 8, 1929, to March 5, 1931, constituted the sold measure of the restitution to be made to these petitioners and should have awarded to this complainant reparation in the amount represented by the difference between the amount found to [fol. 355] have been collected from this complainant and the amount that would have been collected by application of the Cummer Scale.

Fifth Exception

Complainant objects and excepts to "Finding of Law" numbered (9-a), and especially to the finding "that the Cummer Scale of rates were not the lawfully established rates from February 8, 1929, to March 5, 1931, because they were in violation of the statutes of Florida and in violation of the Due Process Clause of the Constitution of Florida and the Constitution of the United States, and in violation of the Equal Protection Clause of the latter," and also especially to the finding that it was or is the duty of the Master to consider and pass upon the question of whether or not the Cummer Scale of rates was unreasonable, unjust and invalid and did not furnish an adequate return on property used.

In support of said exceptions complainant asserts and avers:

(a) That said finding is contrary to law, and is beyond the jurisdiction and power of the Master or of this Court to make.

(b) The Cummer Scale of rates, being the lawfully established rates applicable under the laws of Florida, this Court in this proceeding is without jurisdiction to determine whether such established rates were in violation of the statutes or Constitution of the State of Florida or of the Constitution of the United States.

(c) The Master should have found that the sole question before him and before this Court was and is as to whether the Cummer Scale of rates was the lawfully applicable scale of rates in the State of Florida between February 8, 1929, and March 5, 1931, and should have refused to receive or consider testimony and evidence introduced for the purpose of showing that the Cummer Scale was unjust and unreasonable.

(d) The Master should have found that the Cummer Scale was the lawful State rate in Florida from February 8, 1929, to March 5, 1931, and, as such, constituted the sole basis for awards of restitution herein.

[fol. 356] Sixth Exception

Complainant objects and excepts to the "Finding of Law" numbered (10) in the Master's report and asserts and avers the following grounds therefor:

(a) Said finding is contrary to law.

(b) The Master should have found that the Cummer Scale was the lawfully established scale of rates in Florida from February 8, 1929, to March 5, 1931.

Seventh Exception

Complainant objects and excepts to the Finding of the Special Master in "Finding of Law" numbered (10-a) and as grounds therefor asserts and avers the following:

(a) Neither the Master nor this Court has any jurisdiction or authority to inquire into the reasonableness or justness of the Cummer Scale of rates.

(b) This Court has no jurisdiction to set aside and strike down retroactively, rates maintained under authority of

the State of Florida and no jurisdiction or power to substitute retroactively for such rates other rates that this Court might prescribe as just and reasonable rates.

(c) This Court, having no jurisdiction to set aside the lawfully established scale of rates in the State of Florida or to substitute rates made by itself therefor, there could be no burden upon this complainant to show what would have been a reasonable rate to have been charged by the Atlantic Coast Line Railroad Company as a condition to an award of restitution at the hands of this Court.

[fol. 357] (d) The Master, having found that the Cummer Scale was the established scale of rates in Florida from February 8, 1929, to March 5, 1931, should have found that this Court is without jurisdiction to determine whether such rates were in conflict with the laws or Constitution of Florida and without jurisdiction to prescribe any other or different rates or to consider any other or different rates in arriving at the amount of restitution to be awarded herein.

Eighth Exception

Complainant objects and excepts to the "Finding of Law" numbered (12) by the Master and especially to the finding that any evidence was competent when directed to the question of the justness or reasonableness of the Cummer Scale and in support of said exception asserts and avers:

(a) That this Court is without jurisdiction to consider or determine the question of the justness and reasonableness of the Cummer Scale, such scale having been the established scale for application in Florida during the period February 8, 1929, to March 5, 1931.

(b) The Master should have held that the Atlantic Coast Line Railroad in this proceeding is precluded from showing or attempting to show that the Cummer Scale of rates is invalid on any grounds or for any reason since the Master found that the Cummer Scale of rates were the established rates applicable in Florida during the period here involved.

Ninth Exception

Complainant objects and excepts to "Finding of Fact" numbered (7), wherein "the Master found under the evidence that the Cummer Scale of rates from February 8, 1929, to March 5, 1931, was unreasonable and unjust and did not furnish an adequate return on properties used." Complainant, in support of said exception, avers and asserts the following grounds:

[fol. 358] (a) That said finding was and is beyond the jurisdiction and the power of the Master or of this Court to make.

(b) Upon the grounds hereinafter set forth after the Exception to "Finding of Fact" numbered (9).

Tenth Exception

Complainant objects and excepts to "Finding of Fact" numbered (9), wherein the Master finds that under the evidence "the Cummer Scale of rates from February 8, 1929, to March 5, 1931, was unreasonable and unjust and did not furnish an adequate return on properties used." As grounds for such exception complainant asserts and avers:

(a) That said finding is beyond the jurisdiction and power of the Master or this Court to make and is contrary to law.

(b) This Court is without jurisdiction to try and determine the question of the reasonableness or justness of the Cummer Scale of rates.

(c) This Court has no jurisdiction over the Cummer Scale of rates other than to determine whether it was the established basis of rates that would have been paid by this complainant had the Court, in the first instance, entered the order that the Supreme Court has now said it should have entered.

(d) The said finding is based upon the erroneous theory that in this restitution proceeding the question of the jutsice or injustice of the Cummer Scale of rates may be determined by this Court.

(e) In this restoration proceeding this Court is limited to restoring to this complainant, and others, such sums as

the Atlantic Coast Line Railroad Company obtained from them by reason of the failure of this Court to enter the right decree in the first instance, and the question of the justice and reasonableness of the Cummer Scale is not and cannot be before this Court nor determined by it.

[fol. 359] The Wilson Lumber Company of Florida prays that each and all of its exceptions be sustained, and prays further that it be awarded restitution in the sum of $41,-684.23, with interest at 8% per annum from the date each of the items, constituting such total sum, was collected, the said sum being the amount admitted in the Answer of the defendant as the difference between the amount collected by the Atlantic Coast Line from this complainant and the amount that would have been collected under the Cummer Scale of rates during the period from February 8, 1929 to March 5, 1931, and prays that it be given judgment against the Atlantic Coast Line for said sum.

J. V. Norman, Solicitor for Complainant.

[File endorsement omitted.]

[fol. 360] IN UNITED STATES DISTRICT COURT

In Equity. No. 514

[Title omitted]

EXCEPTIONS OF COMPLAINANTS, STATE OF FLORIDA, ET AL., TO THE REPORT OF THE SPECIAL MASTER—Filed Dec. 5, 1932

Come now complainants, the State of Florida, and A. S. Wells, E. S. Mathews and Mamie G. Eaton, as and constituting Florida Railroad Commission, by their respective undersigned solicitors, on behalf of the several claimants represented by these complainants in this proceeding, and except to the report of Horace M. Holden, Special Master herein, filed in the office of the Clerk of the above entitled Court on the 14th day of November, A. D. 1932, in the following particulars severally, to-wit, each such exception being directed not only to the finding or part thereof to which it is addressed, but also to all of the several matters

and things set forth in said report in support of or relating to such finding or part thereof:

[fol. 361] First Exception

These complainants except to all parts of finding of law numbered 6 of said report (on pages 15 and 16 of said report), except such parts thereof as find that the Court has the right and owes the duty to order restitution in proceedings of this kind, and that under the facts of this case the Court has no discretionary power to deny restitution, and that such right and duty exists irrespective of any express authority by statute; and as grounds and particulars of said exception, the complainants aver the following grounds and particulars severally:

(a) That said Finding as aforesaid, is contrary to law.

(b) The order of the Interstate Commerce Commission sustained by the decree of this Court was not set aside on procedural grounds as set forth in said Finding, but on the contrary the said order of said Interstate Commerce Commission was set aside by the Supreme Court of the United States "for the lack of the basic or essential findings required to support the Commission's order," and said order can give the Atlantic Coast Line Railroad Company no aid or protection.

(c) In restitution proceedings as here, consequent upon the reversal of an erroneous final decree, the sole question is the amount and restoration of the benefits which have been received by reason of the failure of the Court to enter the right decree in the first instance; but even if this were a new and independent suit brought in Florida to recover from the Railroad Company the benefits which it has enjoyed as aforesaid, the Cummer Scale would conclusively be the measure of the recovery, and this Court, before referring this cause to said Special Master, had itself ordered restitution and fixed the measure of it as "the difference [fol. 362] between the amount collected and the established lawful rate in force at the time each sum was made as the Master may find it to have been," and the Master should have found that the Cummer Scale of rates was the lawful rate and was the basis to be employed in computing the restitution to be made herein.

(d) The motion for restitution makes neither a new issue nor a new case, nor has the Atlantic Coast Line Railroad Company the right in restitution proceedings consequent upon the reversal of a final decree, to inject a new issue or to relitigate a former one.

(e) It is the duty of this Court while it has the parties before it to require the Atlantic Coast Line Railroad Company to restore to the several claimants the benefits which it has enjoyed by reason of the failure of this Court to enter in the first instance the decree which the Supreme Court of the United States has now said that this Court should then have entered, and this Court has no jurisdiction in this cause save to require that each party pay back to each other party any and all sums which may have been collected by reason of the unlawful order of the Interstate Commerce Commission and sustained by the decree of this Court.

(f) The fact that the sums of which restitution is now sought may have been collected by the Atlantic Coast Line Railroad Company in good faith or under color of authority or under a bona fide claim of right, is immaterial and irrelevant in this proceeding, in that such charges were made solely under color and by reason of the invalid order of the Interstate Commerce Commission, as sustained by the erroneous decree of this Court, and by reason of the failure of this Court to enter the right decree in the first instance. [fol. 363] And this Court has no authority to allow a party to retain either part or all of any sums received under such circumstances.

(g) This proceeding for restitution differs wholly from a new, separate or independent suit in which the rights of the parties to the sums here in controversy might be determined, since this proceeding for restitution presents no question as to the rights of the parties to the sums in controversy, but only the question as to what sums were exacted by one party of another party by reason of the void order of the Interstate Commerce Commission, which this Court erroneously failed to enjoin and set aside; and the grounds upon which the order of the Interstate Commerce Commission, sustained by this Court, was set aside by the Supreme Court can have no bearing upon the question of restitution here presented, it being sufficient that the Su-

preme Court held said order to be void and that this Court should have enjoined its enforcement.

(h) This specially constituted statutory Court constitutes a part of the Federal governmental machine charged by Congress with the duty of determining at the instance of the State or the citizens the validity or invalidity of the affirmative exercise of Federal power in and by orders of the Interstate Commerce Commission; that the final decree and opinion of this statutory Court while in form negative, in effect were affirmative, in that the same affirmatively found that the part of the order of the Interstate Commerce Commission which was assailed to be valid, and sustained the affirmative exercise of Federal power by the Interstate Commerce Commission, with the result that the Railroad Company received benefits for which restitution ought to be computed and made upon the basis of the difference between the rate prescribed by the unlawful order of the Interstate Commerce Commission and the Cummer Scale.

[fol. 364] Second Exception

These complainants except to Finding of Law numbered 7 of said Report (on page 17 of said Report), and each and every part thereof save such portion thereof as declares that no change has been made by the Florida Railroad Commission in the Cummer Scale of rates and that no application for a change of said rates has been made by said Atlantic Coast Line Railroad Company to said Railroad Commission. And as grounds and particulars of said exception these complainants aver the following severally:

(a) That said Finding, as so excepted to as aforesaid, is contrary to law.

(b) That said Finding is based upon the erroneous theory that in this restitution proceeding the question of the validity or invalidity of the Cummer Scale rates may be determined by this Court and that said Finding is based on the erroneous theory that in this restitution proceeding this Court may undertake to determine whether the rates that would have been charged the several claimants but for the erroneous order of this Court were unjust or unreasonable, and that neither the laws of Florida prescribing such rates nor the principles governing restitution proceedings are sufficient to prevent this Court entering upon such inquiry.

(c) Upon the grounds hereinafter set forth after the exception to Finding of Law numbered 7-B.

[fol. 365] Third Exception

These complainants except to Findings of Law numbered 7-A and 7-B of said Report (pages 17 and 18 of said Report), and each and every part thereof. And as grounds and particulars of said exception these complainants aver the following severally:

(a) That said Finding is contrary to law.

(b) That said Findings are based on the erroneous theory that the question of the amount of restitution to be awarded herein can be affected by the fact as to whether the Atlantic Coast Line Railroad applied to the Florida Commission to change the Cummer Scale of rates, or, having failed so to do, is excused therefrom by reason of the circumstances here existing, and the Master having found that the Cummer Scale was in effect in Florida during the period here involved, it is immaterial whether the Atlantic Coast Line Railroad might have or should have applied to the Florida Railroad Commission to change such scale, and should have held that the question as to whether such scale of rates was unjust or unreasonable was not for the determination of this Court in this proceeding and that the Atlantic Coast Line Railroad is precluded from here bringing into issue any question as to the reasonableness of such rates.

(c) A court of original jurisdiction over the subject matter hereof would be without jurisdiction to apply retroactively a rate different from that maintained in the state by and under authority of the state.

(d) Upon the grounds hereinafter set forth after this exception, to Findings of Law numbered 7, 7-A and 7-B.

[fol. 366] Grounds Applicable Severally and Distributively to Findings of Law Numbered 7, 7-A and 7-B of Said Report (Pages 17, 18 and 19 of Said Report), Jointley and Severally

(e) The Florida Railroad Commission in the proceedings before the Interstate Commerce Commission was not

making opposite contentions from the Atlantic Coast Line Railroad Company. The Railroad Company was defendant in that proceeding. Its answer before the Interstate Commerce Commission denied that there was any violation on its part of the Interstate Commerce Act, and prayed in its answer "that it be hence dismissed." During the course of the proceedings the Railroad Company expressly disclaimed any contention that the Cummer Scale of rates was not compensatory and during such proceedings and at the conclusion of the hearings thereon stated as its position that it had not made and was not making any proposal to revise those rates (Transcript hearing in Jacksonville, 1/20/27, page 904; Perrin, hearing Atlanta, 12/30/31, pages 48, 49; May 9, 1932, pages 241, 242.) The first report of the Interstate Commerce Commission which was stricken down by the Supreme Court of the United States, so stated. The Railroad Company at no time expressed dissatisfaction with or desire to change the Cummer Scale until long after the order of the Interstate Commerce Commission had been entered and after the first decree of this Court in this proceding, viz., March 7th, 1929, when it intervened in defense of the amended order of the Interstate Commerce Commission.

(f) The Florida Railroad Commission has constantly asserted its own jurisdiction and denied the jurisdiction of [fol. 367] the Interstate Commerce Commission over the intrastate rates, and the Supreme Court of the United States in this very proceeding has sustained its contention. There is no basis for the statement by the Master that it would have been useless or futile for the Atlantic Coast Line Railroad Company to have made application to the Florida Railroad Commission for a change of the Cummer Scale of rates. The Florida Railroad Commission filed no proceedings before the Interstate Commerce Commission. It appeared in defense of its rates and it stated in so doing that its doors had been open for years to any complaint which the Atlantic Coast Line Railroad Company might make, but that none had been made down to that very day. (Tr. Jacksonville hearing, Wells, 1/19/27, pages 668 to 670.)

(g) The Atlantic Coast Line Railroad Company at no time during the period of the proceeding before the Inter-

state Commerce Commission or prior thereto or subsequent thereto charged or attempted to charge or proposed to charge for the transpotation of logs in Florida any scale of rates other than the Cummer Scale, except under and in compliance with or under color of the invalid order of the Interstate Commerce Commission, as sustained by the erroneous decree of this Court, and then only after the first decree of this Court had been entered.

(h) The Supreme Court of the United States in this case found that the reasonableness of the Cummer Scale lay with state authority and not with the Interstate Commerce Commission. The unreasonableness and unjustness of the Cummer Scale were not in issue before the Interstate Commerce Commission, were beyond the scope of its authority, and were matters peculiarly for the determination of the Florida Railroad Commission, and the Supreme Court of the United States so found in this proceeding.

[fol. 368] (i) Nothing set forth in said finding offers any excuse to the Atlantic Coast Line Railroad Company for not making application to the Florida Railroad Commission.

(j) The reliance by the Atlantic Coast Line Railroad Company upon the invalid order and erroneous decree of this Court can avail it nothing in this proceeding. In no sense can the proceedings in this case constitute an application by the Atlantic Coast Line Railroad Company to the Florida Railroad Commission for anything.

(k) The Supreme Court of the United States in this suit found in effect that the reasonableness and justness of the Cummer Scale per se lay with the state authorities, viz., with the Florida Railroad Commission; the Master should have found that the Cummer Scale having been voluntarily initiated by the Railroad Company and adopted by the Florida Railroad Commission, became prior to the commencement of this suit the lawful state rate, established by the Florida Commission, binding alike upon the shipper and the carrier, and that the reasonableness and justness of such rate could not be brought into question with respect to any transaction between shipper and carrier except with respect to the future and then only after a hearing upon the reasonableness and justness of such rate after appli-

cation by the Railroad Company and notice to all interested parties.

(l) The Master should have found that the reasonableness or unreasonableness, justness or unjustness of the Cummer Scale is not open to inquiry in these restitution proceedings.

[fol. 369] Fourth Exception

These complainants except to each and every part of Finding of Law numbered 8 (on pages 20 and 21 of said Report); and as grounds and particulars of said exception the Complainants aver the following severally:

(a) That said Finding is contrary to law and is beyond the jurisdiction and power of the Master or of this Court to make.

(b) The Cummer scale of rates being the lawfully established rates applicable under the laws of Florida, this Court in this proceeding is without jurisdiction to hold whether such established rates were reasonable or unreasonable or whether they were in violation of the statutes or constitution of the State of Florida or of the Constitution of the United States.

(c) A federal court of plenary jurisdiction would be without the jurisdiction to apply retroactively the arrestive power and strike down retroactively a rate maintained in a state by and under authority of the state. The Cummer Scale of rates was voluntarily initiated by the Railroad Company more than fifteen years prior to the entry of the unlawful order of the Interstate Commerce Commission, and during all that time was voluntarily maintained for the transportation of logs intrastate in Florida, and long prior to such order was duly adopted by the Florida Railroad Commission as the lawful state rate, and under the laws of Florida and the rules of the Florida Railroad Commission all parties are and were conclusively bound thereby with respect to all transactions in the past.

(d) The motion for restitution makes neither a new issue nor a new case nor has the Railroad Company the right in [fol. 370] these restitution proceedings consequent upon the reversal of a final decree to inject a new issue or to reliti-

gate a former one, and the Master should have found that the sole question before him and before this Court was and is as to whether the Cummer Scale of rates was the lawfully applicable scale of rates in the State of Florida between February 8, 1929, and March 5, 1931, and should have refused to receive or consider testimony and evidence introduced for the purpose of showing that the Cummer Scale was unjust and unreasonable.

(e) This proceeding is a restitution proceeding, consequent upon the reversal of a final decree. The charges made by the Atlantic Coast Line Railroad Company were made solely under color of the invalid order of the Interstate Commerce Commission as sustained by the erroneous decree of this Court and by reason of the failure of this Court to enter the right decree in the first instance (Perrin testimony, Atlanta hearing, 12/29/31, page 30; 9/26/32, p. 26). The effect of the eighth Finding of Law is to suffer the Railroad Company to interpose in this restitution proceeding a new defense where the sole function and duty of the Court is to require the restoration by the Railroad Company of the benefits which it has enjoyed by reason of the failure of this Court to enter the right decree in the first instance.

(f) The Master should have found that the reasonableness or unreasonableness, justness or unjustness of the Cummer Scale is immaterial and irrelevant in this proceeding.

(g) The Master should have found that the Cummer Scale was the lawful established rate from February 8, 1929, to March 5, 1931, and as such constituted the sole basis for the awards of restitution herein.

[fol. 371] (h) The Master should have found that the Cummer Scale having been voluntarily initiated by the Railroad Company and adopted by the Florida Railroad Commission as part of its schedule of rates and became, long prior to the commencement of this suit and thenceforward was "the lawful established rate," and that the reasonableness and justness of such rate cannot be brought into question in this proceeding with respect to any past transactions between shipper and carrier.

Fifth Exception

These complainants except to Finding of Fact numbered 9 of said Report (on page 22 of said Report), and each and every part thereof. And as grounds and particulars of said exception the complainants aver the following severally:

(a) That said Finding was and is beyond the jurisdiction and power of the Master or this Court to make.

(b) The Master should have found as a matter of law that the Cummer Scale was and constituted the measure of the restitution to be made to claimants in this proceeding and should have sustained all objections interposed to the introduction of all testimony and evidence introduced for the purpose of showing that the Cummer Scale was unjust and unreasonable.

(c) Upon the grounds hereinafter set forth after the exception to Finding of Law numbered 9-A.

(d) Reserving their rights under grounds (a), (b) and (c) above, these complainants aver that the said Finding is contrary to the evidence.

[fol. 372] Sixth Exception

These complainants except to Finding of Law numbered 9-A of said Report (on page 22 of said Report), and each and every part thereof. And as grounds and particulars of said exception the complainants aver the following severally:

(a) That said finding is contrary to law and is beyond the power and jurisdiction of the Master or of this Court to make.

Grounds Applicable Severally and Distributively to Finding of Fact Numbered 9 and Finding of Law Numbered 9-A of Said Report (on Page 22 of Said Report). Jointly and Severally

(b) That the Master should have found as a matter of law that the Cummer Scale was the established lawful rate from February 8th, 1929, to March 5th, 1931, and consti-

tuted the measure of restitution to be made to the claimants in this proceeding.

(c) That neither this specially constituted statutory Court nor its Master has jurisdiction to inquire into or receive evidence upon the reasonableness or unreasonableness, justness or unjustness of the Cummer Scale of rates.

(d) The Cummer Scale of rates was voluntarily initiated by the Railroad Company nearly fifteen years prior to the entry of the unlawful order of the Interstate Commerce Commission, and during all that time was voluntarily maintained for the transportation of logs intrastate in Florida, and long prior to such order was duly adopted by the Florida Railroad Commission as the lawful state rate, and under the laws of Florida and the rules of the Florida Railroad Commission all parties are and were conclusively bound thereby with respect to all transactions in the past.

[fol. 373] (e) The Master should have found that the Cummer Scale having been voluntarily initiated by the Railroad Company and adopted by the Florida Railroad Commission as part of its schedule of rates and became long prior to the commencement of this suit and thenceforward was "the lawful established rate," and that the reasonableness and justness of such rate cannot be brought into question in this proceeding with respect to any past transactions between shipper and carrier.

(f) The Master having found in effect that the Cummer Scale of rates was the established lawful rate prior to February 8th, 1929, the Master should have found that this Court is without jurisdiction and power to determine whether such scale of rates was in violation of the statutes or Constitution of the State of Florida or the Constitution of the United States because unjust or unreasonable.

Seventh Exception

These complainants except to so much of Finding of Law numbered 10 (on page 24 of said report) as recites or implies that the said Cummer Scale was invalid at any time or for any period. And for grounds and particulars of said exception the complainants aver the following severally:

(a) Said Finding is contrary to law.

(b) That the Master should have found that the Cummer Scale was the established lawful rate from February 8th, 1929, to March 5th, 1931, and should have found that the claimants in this proceeding are entitled to restitution upon the basis of the Cummer Scale.

[fol. 374] Eighth Exception

These complainants except to Finding of Law numbered 10-A (on pages 24 to 27 inclusive of said report), and each and every part thereof; and these complainants especially except to so much of said Finding as finds that there is no lawful established rate in Florida for the transportation of logs therein referred to from February 8th, 1929, to March 5th, 1931, and to so much thereof as finds that the Master of this Court has the power to consider or determine the reasonableness or justness of the Cummer Scale with respect to any transactions had in the past or directly or indirectly to fix a rate for past application either by declaring the Cummer Scale to be unreasonable or by attempting to fix a rate which would have been a reasonable rate to have been charged by the Atlantic Coast Line Railroad Company during the period in question. And as grounds and particulars of such exception these complainants assert and aver the following severally:

(a) That said Finding is contrary to law.

(b) That the Master should have found that neither the Master nor this Court has any authority or jurisdiction to inquire into the reasonableness or justness of the Cummer Scale of rates.

(c) This Court has no jurisdiction to strike down a rate prescribed by the Florida Railroad Commission and maintained under authority of the State of Florida, and has no jurisdiction or power to substitute retroactively for such rates other rates that this Court might prescribe as just and reasonable.

(d) This Court having no jurisdiction to set aside and strike down retroactively rates maintained under the au-
[fol. 375] thority of the State of Florida and no jurisdiction or power to substitute retroactively for such rates other

rates that this Court might prescribe as just and reasonable rates, there is and can be no burden upon the claimants in this proceeding to show that the rate charged by the Railroad Company solely under color of the invalid order of the Interstate Commerce Commission as sustained by the erroneous decree of this Court was unreasonable, or to show what would have been a reasonable rate to have been charged by the Atlantic Coast Line Railroad Company as a condition to an award of restitution at the hands of this Court.

(e) The Master having found that the Cummer Scale was the established scale of rates in Florida from February 8th, 1929, to March 5th, 1931, should have found that this Court is without jurisdiction to determine whether such rates were in conflict with the laws or Constitution of Florida, and was without jurisdiction to prescribe any other or different rates or to consider any other or different rates in arriving at the amount of restitution to be awarded herein.

(f) The Master should have found that it was and is the duty of this Court while it has the parties before it to require the Atlantic Coast Line Railroad Company to restore to the claimants in this proceeding the benefits which it has enjoyed by reason of the failure of this Court to enter in the first instance the decree which the Supreme Court of the United States has now said that this Court should then have entered, and this Court has no jurisdiction in this cause to take any action other than to require such restoration.

[fol. 376] Ninth Exception

These complainants except to so much of Finding of Law numbered 11 (on page 28 of said Report) as may be construed to find that the pleadings and evidence before this Court on the final hearing and rehearing of this cause were and are not before the Master as evidence insofar as it is relevant, material and competent in these proceedings and within the jurisdiction of this Court and the scope of said order of reference. And as grounds and particulars of said exception these complainants aver the following severally:

(a) That said Finding is contrary to law.

Tenth Exception

These complainants except to all parts of Finding of Law numbered 12 (on page 28 of said Report), except so much thereof as overrules objections made by the Railroad Company to evidence introduced by certain claimants as to rates charged by other carriers for the transportation of logs, and these complainants especially except to so much of said finding as overrules the objections made by the several claimants in this proceeding to testimony and evidence offered by the Atlantic Coast Line Railroad Company for the purpose of showing that the Cummer Scale would be unreasonable or unjust and all evidence introduced by the Railroad Company as to what was a reasonable and just rate for the transportation of the subject matter of these restitution proceedings. And as grounds and particulars of said exception these complainants aver the following severally:

(a) That said Finding is contrary to law.

[fol. 377] (b) The Master should have found that the reasonableness or unreasonableness, justness or unjustness of the Cummer Scale was not open to inquiry in these restitution proceedings, such scale having been the established scale for application in Florida during the period from February 8, 1929, to March 5, 1931.

(c) The Master should have held that the Atlantic Coast Line Railroad Company in this proceeding is precluded from showing or attempting to show that the Cummer Scale of rates is invalid on any grounds or for any reason, since the Master found that the Cummer Scale of rates were the established rates applicable in Florida during the period here involved.

(d) The Master should have found that it was and is the duty of this Court while it has the parties before it to require the Atlantic Coast Line Railroad Company to restore to the claimants in this proceeding the benefits which it has enjoyed by reason of the failure of this Court to enter in the first instance the decree which the Supreme Court of the United States has now said that this Court should then have entered, and this Court has no jurisdiction in this cause to take any action other than to require such restoration.

Eleventh Exception

These complainants except to Finding of Fact numbered 7 (on page 35 of said Report), and each and every part thereof. And as grounds and particulars for said exception these complainants aver the following severally:

(a) That said Finding is contrary to law.

(b) That said Finding was and is beyond the jurisdiction and power of the Master or this Court to make.

[fol. 378] (c) The Master should have found as a matter of law that the Cummer Scale was and constituted the measure of the restitution to be made to the claimants in this proceeding and should have sustained all objections interposed to the introduction of all testimony and evidence introduced for the purpose of showing that the Cummer Scale was unjust and unreasonable.

(d) That the Master should have found as a matter of law that the Cummer Scale was the established lawful rate from February 8, 1929, to March 5, 1931.

(e) That neither this specially constituted statutory Court nor its Master has jurisdiction to inquire into or receive evidence upon the reasonableness or unreasonableness, justness or unjustness of the Cummer Scale of rates, and the Master should have so found, and should have further found that the reasonableness and justness of such rates cannot be brought into question in this proceeding with respect to any past transaction between shipper and carrier.

(f) The Cummer Scale of rates was voluntarily initiated by the Railroad Company nearly fifteen years prior to the entry of the unlawful order of the Interstate Commerce Commission, and during all that time was voluntarily maintained for the transportation of logs intrastate in Florida, and long prior to such order was duly adopted by the Florida Railroad Commission as the lawful state rate, and under the laws of Florida and the rules of the Florida Railroad Commission all parties are and were conclusively bound thereby with respect to all transactions in the past.

(g) The Master having found in effect that the Cummer Scale of rates was the established lawful rate prior to

[fol. 379] February 8, 1929, this Court is without jurisdiction and power to determine whether such scale of rates was in violation of the statutes or Constitution of the State of Florida or the Constitution of the United States because unjust or unreasonable, and the Master should have found that the Cummer Scale was the established lawful rate from February 8, 1929, to March 5, 1931, and constituted the measure of the restitution to be made to these complainants.

(h) Reserving their exceptions under grounds (a), (b), (c), (d), (e), (f) and (g) above, these complainants aver that the said Finding is contrary to the evidence.

Twelfth Exception

And these complainants further except to the Report of said Master in that this Court by its former orders has found that the several claimants in this proceeding and each of them were and are entitled to restitution, and the said Master ought to have found that the sums severally to be restored to the several claimants, respectively, should be measured by the difference between the amounts charged and collected by the Railroad Company for the transportation of logs of the tariff description in question under the unlawful order of the Interstate Commerce Commission as sustained by the erroneous decree of this Court on the one hand, and the Cummer Scale on the other hand, together with interest at the rate of 8% per annum computed on such amounts respectively from the day that each shipment was made by the several claimants respectively, as aforesaid.

[fol. 380] Having excepted as aforesaid, these complainants pray that each and all of their several exceptions be sustained, and that this Court do make and enter herein a decree adjudging that the several claimants in this proceeding and each of them were and are entitled to restitution and that the sums severally to be restored to the several claimants, respectively, should be measured by the difference between the amounts charged and collected by the Railroad Company for the transportation of logs of the tariff description in question under the unlawful order of the Interstate Commerce Commission as sustained by the erroneous decree of this Court, on the one hand, and the

Cummer Scale on the other hand, together with interest at the rate of 8% per annum computed on such amounts severally from the day that each shipment was made by the several claimants herein, respectively, as aforesaid, and do forthwith re-refer the said cause to said Master with directions to calculate the sums severally to be restored to the several claimants respectively as aforesaid on the basis aforesaid, and to report the same to this Court with all convenient speed.

Cary D. Landis, Theo. T. Turnbull, Solicitors for said Complainants.

[fol. 381] [File endorsement omitted.]

[fol. 382] IN UNITED STATES DISTRICT COURT

No. 511. In Equity.

[Title omitted]

MOTION OF THE ATLANTIC COAST LINE RAILROAD COMPANY TO STRIKE CERTAIN EXCEPTIONS MADE BY THE BROOKS-SCANLON CORPORATION TO THE REPORT OF THE HONORABLE HORACE M. HOLDEN, SPECIAL MASTER—Filed December 9, 1932.

I

In paragraph (h) of its First Exception the Brooks-Scanlon Corporation says that the "Master should have found that the Cummer Scale of rates was and is the basis to be employed in computing the restitution to be made herein." The Atlantic Coast Line Railroad Company moves that this paragraph be stricken on the ground that the same is too general and indefinite and points out no respect in which the Master's finding was erroneous, either in law or in fact. If this exception is predicated on the contention that the Master should have found that the evidence showed the Cummer Scale of rates to be reasonable and just and, therefore, the lawful established scale of rates, the said exception does not comply with the rules and practices of this Court requiring exceptions to findings of fact to make [fol. 383] reference to the particular pages in the transcript of evidence where testimony relating to such matter is set forth, and for this reason is insufficient as a matter of law.

II

The Atlantic Coast Line Railroad Company moves that paragraph (e) of the Fourth Exception filed by the Brooks-Scanlon Corporation be stricken on the ground that it refers to no part of the transcript of evidence nor to any exhibits or documents introduced in evidence to sustain the allegation of fact therein contained, and under the rules and practice of this Court is insufficient and therefore entitled to no consideration.

III

In paragraph (d) of the Sixth Exception, the Brooks-Scanlon Corporation avers that the finding of the Master to the effect that the Cummer Scale of rates from February 8th, 1929 to March 5th, 1931 was unreasonable and unjust and did not furnish an adequate return on properties used "is contrary to evidence". This exception omits altogether any reference to any portion of the transcript of evidence or any documents or exhibits, introduces before the Master bearing on the question of the reasonableness or unreasonableness of the Cummer Scale of rates, and said exception does not, therefore, conform to the rules of Equity Practice nore to the rules of this Court requiring that exceptions to findings of fact should specify the portions of the record on which reliance is placed to sustain the alleged error. For these reasons the Atlantic Coast Line Railroad Company moves that said paragraph of the Sixth Exception and all other parts of the Sixth Exception which may be con-
[fol. 384] strued as exceptions to the Master's finding of fact be stricken.

IV

The Atlantic Coast Line Railroad Company moves that paragraph (h) of the Seventh Exception filed by the Brooks-Scanlon Corporation, be stricken for the same reasons given in the above paragraph III of this Motion.

V

In paragraph (b) of the Eighth Exception the Brooks-Scanlon Corporation says: "that the Master should have found that the Cummer Scale was the established lawful rate from February 8th, 1929 to March 5th, 1931 * * *."

This exception is too vague and indefinite in that it does not specify whether the alleged error was one of law or is predicated on an erroneous conclusion drawn from the evidence. In so far as it may be an exception to an error of law it is insufficient in that it does not point out what respect the said finding is erroneous nor in what particulars the Master erred; as an exception to a finding of fact paragraph (b) is wholly insufficient in that it does not point to the portions of the record or to any documentary evidence on which reliance is placed to sustain alleged error, as required by rules of Equity Practice and by practice of this Court. For these reasons the Atlantic Coast Line Railroad Company asks that said paragraph be stricken from the exceptions.

VI

In paragraph (e) of the Ninth Exception filed by Brooks-Scanlon Corporation it is said that "the Master having found that the Cummer Scale was the established scale of [fol. 385] rates in Florida from February 8th, 1929 to March 5th 1931, should have found that this Court is without jurisdiction to determine whether such rates were in conflict with the laws or Constitution of Florida." This exception is predicated on the premise that the Master found that the Cummer Scale was the established scale of rates during the period in question, whereas in his Finding of Law No. 9-A the Master found: "that the Cummer Scale of rates were not the lawful established rates during the period in question. The Atlantic Coast Line Railroad Company moves, therefore, that this paragraph be stricken because founded on an erroneous assumption as to the Master's findings.

VII

The Atlantic Coast Line Railroad Company moves that paragraph (c) of the Eleventh Exception filed by Brooks-Scanlon Corporation be stricken on the ground that the exception is predicated on the Cummer Scale being the established scale of rates for application in Florida during the period from February 8th, 1929, to March 5th, 1931, whereas the said Master has found in his Finding of Law No. 9-A that the Cummer Scale of rates was not the established rate during the period in question and the said exception has, therefore, been made on an erroneous assumption as to the findings of the Master.

VIII

The Atlantic Coast Line Railroad Company moves that paragraph (j) of the Twelfth Exception filed by Brooks-Scanlon Corporation be stricken for the same reason set [fol. 386] forth in paragraph IV of this Motion, dealing with paragraph (h) of the Seventh Exception.

IX

That Atlantic Coast Line Railroad Company moves that paragraph (k) of the Twelfth Exception filed by the Brooks-Scanlon Corporation be stricken for the same reasons given in paragraph III of this Motion, dealing with paragraph (d) of the Sixth Exception.

X

In the Thirteenth Exception filed by the Brooks-Scanlon Corporation, petitioners say "that this Court by its former orders has found that these petitioners and each of them were and are entitled to restitution." The Atlantic Coast Line Railroad Company moves that this portion of the Thirteenth Exception be stricken on the ground that the record indicates that no such order has been at any time made by this Court; that the statement contained in this exception is untrue and misleading.

Wherefore the Atlantic Coast Line Railroad Company prays that the above mentioned exceptions of the Brooks-Scanlon Corporation be stricken for the reasons herein set forth.

Carl H. Davis, W. E. Kay, Alston, Alston, Foster & Moise, Attys. for A. C. L. R. R.

12/9/32.

[fol. 387] [File endorsement omitted.]

[fol. 388] IN UNITED STATES DISTRICT COURT

No. 512. In Equity.

[Title omitted]

MOTION OF ATLANTIC COAST LINE RAILROAD COMPANY TO STRIKE CERTAIN EXCEPTIONS MADE BY THE WILSON LUMBER COMPANY OF FLORIDA TO THE REPORT OF THE HONORABLE HORACE M. HOLDEN, SPECIAL MASTER—Filed December, 9, 1932

I

In paragraph (c) of the Third Exception the Wilson Lumber Company says it was immaterial whether the Atlantic Coast Line Railroad Company applied to the Florida Railroad Commission to change these rates because of "the Master having found that the Cummer Scale was in effect in Florida during the period here involved." The Atlantic Coast Line Railroad Company moves that the portion of the paragraph herein quoted be stricken for the reason that the said Master did not find the Cummer Scale was in effect during the period here involved, but, on the contrary, in his Findings of Law No. 9-A found "that the Cummer Scale of rates were not the lawful established rates from February 8th, 1929, to March 5th, 1931, because they were in violation of the due process clause of the Constitution of Florida and the Constitution of the United States and in violation of the equal protection laws of the latter.

[fol. 389]

II

In paragraph (d) of the Third Exception, the Wilson Lumber Company says: "the Master, having held that the Cummer Scale of rates was in effect in Florida during the period involved should have held that the question as to whether such scale of rates was unjust or unreasonable was not for the determination by this Court in this proceeding • • •." The Atlantic Coast Line Railroad Company moves that this paragraph be stricken for the same reasons given in the above paragraph of this Motion.

III

In paragraph (g) of the Third Exception, the Wilson Lumber Company says that the Atlantic Coast Line Rail-

road Company "is precluded from showing or attempting to show that the Cummer Scale of rates is invalid upon any ground and for any reason since the Master found that the Cummer Scale of rates were the lawfully established rates applicable in Florida during the period here involved." The Atlantic Coast Line Railroad Company moves that this paragraph be stricken for the reason that the Master did not find that the Cummer Scale of rates were the lawfully established rates, but, on the contrary, in his Findings of Law No. 9-A found "that the Cummer Scale of rates were not the lawful established rated from February 8th, 1929, to March 5th, 1931.

IV

In paragraph (b) of the Fourth Exception the Wilson Lumber Company says that "this Court is without jurisdiction to determine the reasonableness or unreasonableness of the Cummer Scale of rates, it having been found that the Cummer Scale of rates were the lawfully estab- [fol. 390] lished rates in the State of Florida * * *" during the period in question. The Atlantic Coast Line Railroad Company moves that this paragraph be stricken for the reason that there has been no finding that the Cummer Scale of rates were the lawfully established rates, but, on the contrary, the Master in his Findings of Law No. 9-A found "that the Cummer Scale of rates were not the lawful established rates" during the period in question.

V

In paragraph (e) of its Fourth Exception, the Wilson Lumber Company says: "that Master should have found that the Cummer Scale of rates, being the lawfully established scale of rates under authority of the State of Florida from February 8th, 1929, to March 5th, 1931, constituted the sole measure of the restitution to be made to these petitioners * * *" The Atlantic Coast Line Railroad Company moves that this paragraph be stricken for the reasons given in the last preceding paragraph hereof, viz.: "that the Master has found in his Finding of Law No. 9-A that the Cummer Scale of rates were not the lawful established rates" during the period in question.

VI

In paragraph (d) of the Fifth Exception filed by the Wilson Lumber Company it is said that the "master should have found that the Cummer Scale was the lawful State rate in Florida from February 8th, 1929, to March 5th, 1931, and, as such, constituted the sole basis for awards of restitution herein." This exception omits altogether any refer- [fol. 391] ence to any portion of the transcript of evidence or any documents or exhibits introduced before the Master bearing on the question of the reasonableness or unreasonableness of the Cummer Scale of rates, and said exception does not, therefore, conform to the rules of Equity Practice nor to the rules of this Court requiring that exceptions to findings of fact should specify the portions of the record on which reliance is placed to sustain the alleged error. For these reasons the Atlantic Coast Line Railroad moves that said paragraph of the Fifth Exception and all other parts of the Fifth Exception which may be construed as exceptions to the Master's finding of fact be stricken.

VII

In paragraph (b) of the Sixth Exception, the Wilson Lumber Company says that "the Master should have found that the Cummer Scale was the lawfully established scale of rates in Florida from February 8th, 1929, to March 5th, 1931." This exception is too vague and indefinite in that it does not specify whether the alleged error was one of law or is predicated on an erroneous conclusion drawn from the evidence. In so far as it may be an exception to an error of law it is insufficient in that it does not point out in what respect the said finding is erroneous nor in what particulars the Master erred; as an exception to a finding of fact paragraph (b) is wholly insufficient in that it does not point to the portions of the record or to any documentary evidence on which reliance is placed to sustain alleged error, as required by rules of Equity Practice [fol. 392] and by practice of *of* this Court. For these reasons the Atlantic Coast Line Railroad Company asks that said paragraph be stricken from the exceptions.

VIII

In paragraph (d) of the Seventh Exception filed by the Wilson Lumber Company it is said that "the Master hav-

ing found that the Cummer Scale was the established scale of rates in Florida from February 8th, 1929, to March 5th, 1931, should have found that this Court is without jurisdiction to determine whether such rates were in conflict with the laws or Constitution of Florida, and was without jurisdiction to prescribe any other or different rates or to consider any other or different rates in arriving at the amount of restitution to be awarded herein." This exception is predicated on the premise that the Master found that the Cummer Scale was the established scale of rates during the period in question, whereas in his Finding of Law No. 9-A the Master found: "that the Cummer Scale of rates were not the lawful established rates" during the period in question. The Atlantic Coast Line Railroad Company moves, therefore, that this paragraph be stricken because founded on an erroneous assumption as to the Master's findings.

IX

The Atlantic Coast Line Railroad Company moves that the Eighth Exception filed by the Wilson Lumber Company including both paragraphs (a) and (b) be stricken on the ground that each was made on the assumption that "the Master found that the Cummer Scale of rates were the lawful established rates applicable in Florida during the period here involved"; whereas said Master in his Finding of [fol. 393] Law No. 9-A declared that the Cummer Scale of rates were not the lawful scale during the period in question.

Wherefore the Atlantic Coast Line Railroad Company prays that the above mentioned exceptions of the Wilson Lumber Company of Florida be stricken for the reasons herein set forth.

Carl H. Davis, W. E. Kay, Alston, Alston, Foster & Moise, Attys. for A. C. L. R. R.

12/9/32.

[fol. 394] [File endorsement omitted.]

[fol. 395] IN UNITED STATES DISTRICT COURT

No. 514. In Equity

[Title omitted]

MOTION OF THE ATLANTIC COAST LINE RAILROAD COMPANY TO STRIKE CERTAIN EXCEPTIONS MADE BY THE STATE OF FLORIDA AND THE FLORIDA RAILROAD COMMISSION TO THE REPORT OF THE HONORABLE HORACE M. HOLDEN, SPECIAL MASTER—Filed December 9, 1932

I

In paragraph "(c)" of the First Exception the State of Florida says that restitution should have been granted to the claimants on the ground that "the Master should have found that the Cummer Scale of rates was the lawful rate and was the basis to be employed in computing the restitution to be made herein." The Atlantic Coast Line Railroad Company moves that such part of this exception be stricken on the ground that the same is too vague and general, and specifies no reasons why the Master should have found the Cummer Scale of rates to be lawful nor does it point out in what respect the Master's finding to the contrary was unsupported by law or the evidence.

[fol. 396]

II

In paragraph "(b)" of the Third Exception the State of Florida and the Florida Railroad Commission say it was immaterial whether the Atlantic Coast Line Railroad Company applied to the Florida Railroad Commission to change these rates because of "the Master having found that the Cummer Scale was in effect in Florida during the period here involved." The Atlantic Coast Line Railroad Company moves that the portion of the paragraph herein quoted be stricken for the reason that the said Master did not find the Cummer Scale was in effect during the period here involved, but on the contrary in his Findings of Law No. 9-A found "that the Cummer Scale of rates were not the lawful established rates from February 8th, 1929 to March 5th, 1931, because they were in violation of the due process clause of the Constitution of Florida and the Constitution of the United States and in violation of the equal protection laws of the latter.

III

The Atlantic Coast Line Railroad Company moves that paragraph "(g)" of the Third Exception filed by the State of Florida and the Florida Railroad Commission be stricken on the ground that it refers to no part of the transcript of evidence nor to any exhibits or documents introduced in evidence to sustain the allegation of fact therein contained, and under the rules and practice of this Court is insufficient and therefore entitled to no consideration.

IV

In paragraph "(b)" of the Fourth Exception filed by the State of Florida and the Florida Railroad Commission [fol. 397] it is said that "the Cummer Scale of rates being the lawfully established rates applicable under the laws of Florida, this Court in this proceeding is without jurisdiction to hold whether such established rates were reasonable or unreasonable. * * *." The Atlantic Coast Line Railroad Company moves that this paragraph be stricken for the reason that there has been no finding that the Cummer Scale of rates were the lawfully established rates, but, on the contrary, the Master in his Finding of Law No. 9-A found: "that the Cummer Scale of rates were not the lawful established rates" during the period in question.

V

In paragraph "(d)" of the Fifth Exception of the State of Florida and the Florida Railroad Commission, they aver that the finding of the Master to the effect that the Cummer Scale of rates from February 8th 1929 to March 5th 1931 are unreasonable and unjust and did not furnish an adequate return on properties used "is contrary to evidence". This exception omits altogether any reference to any portion of the transcript of evidence or any documents or exhibits introduced before the Master bearing on the question of the reasonableness or unreasonableness of the Cummer Scale of rates, and said exception does not, therefore, conform to the rules of Equity Practice nor to the rules of this Court requiring that exceptions to findings of fact should specify the portions of the record on which reliance is placed to sustain the alleged error. For these reasons the Atlantic Coast Line Railroad Company moves that said paragraph of the Fifth Exception and all other parts of

the Fifth Exception which may be construed as exceptions to the Master's finding of fact be stricken.

[fol. 398]

VI

In paragraph "(b)" of the Seventh Exception the State of Florida and the Florida Railroad Commission say "that the Master should have found that the Cummer Scale was established lawful rate from February 8th 1929 to March 5th 1931. * * *." This exception is too vague and indifinite in that it does not specify whether the alleged error was one of law or is predicated on an erroneous conclusion drawn from the evidence. In so far as it may be an exception to an error of law it is insufficient in that it does not point out in what respect the said finding is erroneous nor in what particulars the Master erred; as an exception to a finding of fact paragraph (b) is wholly insufficient in that it does not point to the portions of the record or to any documentary evidence on which reliance is placed to sustain alleged error, as required by rules of Equity Practice and by practice of this Court. For these reasons the Atlantic Coast Line Railroad Company asks that said paragraph be stricken from the exceptions.

VII

In paragraph (e) of the Eighth Exception filed by the State of Florida and the Florida Railroad Commission it is said that "the Master having found that the Cummer Scale was the established scale of rates in Florida from February 8th 1929 to March 5th, 1931, should have found that this Court is without jurisdiction to determine whether such rates were in conflict with the laws or Constitution of Florida, and was without jurisdiction to prescribe any other or different rates or to consider any other or different rates in arriving at the amount of restitution to be awarded [fol. 399] herein." This exception is predicated on the premise that the Master found that the Cummer Scale was the established scale of rates during the period in question, whereas in his Finding of Law No. 9-A the Master found: "that the Cummer Scale of rates were not the lawful established rates" during the period in question. The Atlantic Coast Line Railroad Company moves, therefore, that this paragraph be stricken because founded on an erroneous assumption as to the Master's findings.

VIII

The Atlantic Coast Line Railroad Company moves that paragraphs (b) and (c) of the Tenth Exception by the State of Florida and the Florida Railroad Commission be stricken on the ground that the exception is predicated on the Cummer Scale being the established scale of rates for application in Florida during the period from February 8th, 1929 to March 5th, 1931, whereas the said Master has found in his Finding of Law No. 9-A that the Cummer Scale of rates was not the established rate during the period in question and the said two paragraphs of exceptions have, therefore, been made on an erroneous assumption as to the findings of the Master.

IX

The Atlantic Coast Line Railroad Company moves that that portion of paragraph (g) of the Eleventh Exception reading as follows and made by the State of Florida and the Florida Railroad Commission: "The Master should have found that the Cummer Scale was the established lawful rate from February 8th, 1929 to March 5th, 1931", be stricken from the report for the reasons set forth in para-
[fol. 400] graph VI of this Motion dealing with paragraph (b) of the Seventh Exception of the State of Florida and the Florida Railroad Commission.

X

The Atlantic Coast Line Railroad Company moves that paragraph (h) of the Eleventh Exception made by the State of Florida and the Florida Railroad Commission be stricken for the same reasons as given in paragraph V of this Motion, dealing with paragraph (d) of the Fifth Exception.

XI

In the Twelfth Exception filed by the State of Florida and the Florida Railroad Commission, complainants say "that this Court by its former orders has found that the several claimants in this proceeding and each of them were and are entitled to restitution." The Atlantic Coast Line Railroad Company, moves that this portion of the Twelfth Exception be stricken on the ground that the record indicates that no such order has been at any time made by this

Court; that the statement contained in this exception is untrue and misleading.

Wherefore the Atlantic Coast Line Railroad Company prays that the above mentioned exceptions of the State of Florida and the Florida Railroad Commission be stricken for the reasons herein set forth.

Carl H. Davis, W. E. Kay, Alston, Alston, Foster & Moise, Attys. for A. C. L. R. R.

December 9, 1932.

[fol. 401] [File endorsement omitted.]

[fol. 402] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

No. 514

STATE OF FLORIDA et al.

vs.

UNITED STATES OF AMERICA

No. 511

BROOKS-SCANLON CORPORATION et al.

vs.

UNITED STATES OF AMERICA

No. 512

WILSON LUMBER COMPANY OF FLORIDA

vs.

UNITED STATES OF AMERICA

OPINION ON EXCEPTIONS—Filed January 30, 1933

The present controversy arises on three separate but similar motions for restitution made one by the Railroad Commission of Florida and one by Wilson Lumber Company, and the third by Brooks-Scanlon Corporation, Wilson

Cypress Company and Cummer Cypress Company in three several bills filed by them in this court to enjoin, set aside and annul so much of a certain order of the Interstate Commerce Commission as established a scale of intrastate rates on logs over lines of the Atlantic Coast Line Railroad Company in Florida. This court upheld the order and refused an injunction. The Supreme Court held the order invalid and reversed the judgment. Florida vs. United States, 282 U. S. 194. On making the mandates the judgment of this court, decree was entered on March 7th, 1931, setting aside the assailed order. Jurisdiction was reserved over these motions for restitution, which prayed that the Atlantic Coast Line Railroad be required to repay what it had col-
[fol. 403] lected by virtue of the erroneous decree of this court pending the appeal, to be measured by the difference between the rate prescribed by the Interstate Commerce Commission and the lower rates previously in force established by the Florida Railroad Commission and known as the Cummer Scale. The restitution sought by the Florida Railroad Commission was in behalf of shippers in Florida which it claimed to have been representing in the litigation by virtue of a statute of Florida. Restitution was ordered and a master appointed to ascertain it "as measured by the difference between the amount collected and the established lawful rate at the time each shipment was made as the master may find it to have been." As foreshadowed in the answers to the motions for restitution, dispute arose as to whether the Cummer Scale was the established lawful rate, the Railroad Company contending that it had been superseded by the Florida Commission by its Orders Nos. 979 and 990, and if not that it was unreasonable and confiscatory, and under Florida law was subject to attack in private litigation between shipper and carrier. On the master's application for further instructions we directed him to consider and report on these contentions, as the court was not then sufficiently advised touching the law of Florida to decide them. The master reported sums aggregating $293,946.38 collected from the several claimants in excess of what would have been collected on the Cummer Scale, but that while the Cummer Scale had not been superseded by any valid order of the Florida Railroad Commission nor by certain injunctions issued from other courts, it was not an established lawful rate for any shipment involved because under the law of Florida it was only prima

[fol. 404] facie correct, and was in fact unjust and unreasonable, and unenforceable under the Florida statutes, and was unremunerative and confiscatory and invalid under the Constitutions of Florida and of the United States. He found that "Class P Rates" which prevailed for logs on other railroads in Florida and also on the Atlantic Coast Line for distances above 170 miles, which distances were not included in the Cummer Scale, were not established on the Atlantic Coast Line for distances under 170 miles, and that there was no established lawful rate, but that the common law obligation to carry at a reasonable rate was the only applicable limit of lawful charges. Not having been commissioned to inquire into what would have been reasonable charges, he went no further, and reported no restitution because there was no available measure of it. The matter comes before us on exceptions to this report. The claimants contend that they are severally entitled to have restitution measured by the Cummer Scale, it being a rate voluntarily established and approved by the Florida Commission, the court having no power to go behind it; but if not, that the master should be directed to measure it by the common law standard. The Railroad Company contends that the Cummer Scale was superseded by the order of the Florida Commission and by the injunction in another court against its enforcement, but if not, that it is noncompensatory and confiscatory and became a nullity when the Railroad Company elected to disregard it, and that class P rates should thereupon be applied. It also denies generally liability to make any restitution. What we now say applies equally to all the motions.

[fol. 405] Conclusions of Fact

The attacked order of the Interstate Commerce Commission was made on Aug. 2, 1928. The first judgment of this court refusing to interfere as to Northern Florida was Jan. 17th, 1929. The order went into effect Feb. 8, 1929, in the northern portion of Florida. Thereafter on amendment by Interstate Commerce Commission it was made clearly applicable to the whole of Florida. This court on supplemental bill again refused to interfere by opinion dated March 22, 1929, and decree dated April 17, 1929. The Rail-

road Company intervened and became a party on March 7, 1929. The decree setting aside the order under mandate of the Supreme Court was entered March 7, 1931. The shipments in controversy were made between Feb. 8, 1929, and March 7, 1931. Meanwhile the Interstate Commerce Commission rates as applying to all Florida had been filed by the Railroad Company with the Florida Commission. The Commission on Jan. 13, 1929, by its Order No. 979 undertook, following the first judgment of this court, to restrict their application to north Florida and to order enforcement of their own rates elsewhere. On Feb. 1st, 1929, the Florida Railroad Commission filed a bill in the state court to require by injunction enforcement of Order No. 979. The Coast Line resisted the enforcement, and on Feb. 5th, 1929, sought to remove the case to the Federal courts. On Feb. 7, 1929, it began litigation against the Commission in another Federal court, and on Feb. 14, 1929, obtained a restraining order from the Circuit Court of Appeals to quiet the cross-fire of penalties threatening under the opposing rates. It did not, however, make any request to the Florida Railroad Commission itself to revoke [fol. 406] or modify the Cummer Scale, relying upon the annulment of it attempted by the Interstate Commerce Commission, and charging the higher rates fixed by it. The Cummer Scale, however, ceased to be a voluntary rate when the Railroad Company began to oppose the Florida Commission's enforcement of it, and ceased to use it on Feb. 7th, 1929.

The Florida Railroad Commission's Order No. 979 of Jan. 30th, 1929, undertaking to define the situation that would exist on Feb. 8 when the I. C. C. order as then limited by this court would go into effect, in its first paragraph states: "The purpose of this order is to *amend the Florida intrastate rates* to conform to the orders of the Interstate Commerce Commission in its docket 18364 as construed and defined by the District Court of the United States for the Northern District of Georgia in its opinion of Jan. 17th, 1929." After recognizing the effect of the order so far as supported by the court's decision to supersede the state rates in the defined territory, Order 979 does not purport directly to revoke or alter the Florida rates, but declares that they shall continue in effect "except that so long as the said decision of the said Federal court shall or may remain in force and unreversed the said tariffs will under

authority of the Interstate Commerce Commission have the effect of changing and increasing only and solely the intrastate rates" as defined in the Interstate Commerce Commission's order as interpreted by this court. No notice to the public or carriers and interested parties provided for by §§ 6722 and 6723 of the Comp. Stats. of Florida of 1927 is recited or was formally given.

On April 20, 1929, after the second decision of this court, the Florida Railroad Commission passed its Order No. 990. It recited the intervening occurrences before the Interstate [fol. 407] Commerce Commission and in this court, and announced a purpose to appeal but recognized the binding force of this court's decision until reversed and then ordered to be "*suspended* so much of Order 979 as related to intrastate rates on logs of the sort here involved so long as the decree of said court should remain in force and effect unmodified and unreversed", and that for the same period "the distance scale of commodity rates in force and effect under the authority of the Railroad Commissioners of the State of Florida on and prior to Feb. 7, 1929, for the transportation of logs • • • *be and they are hereby suspended.*" As to Order 990 the statutory notices were not given, but the claimants through the Commission which represented them and the complainants, except Wilson Lumber Company, by the participation of their counsel in the preparation of the order knew of it before and at the time of its making.

The Cummer Scale in substance was voluntarily established in 1903 and 1904 by Jacksonville & Southwestern Railroad Company when that railroad and the timber to be transported were owned by the same interests; and when the Atlantic Coast Line Railroad Company bought the railroad were by it contracted to be maintained until all the timber was transported. In 1914, to avoid complaint of discrimination, the Atlantic Coast Line Company proposed to extend the rates to its other lines in Florida. The Florida Railroad Commission took the position that the scale was too low to be compensatory and could not be involuntarily enforced, but permitted its establishment to avoid discrimination. The Railroad Company was neutral in the contest before the Interstate Commerce Commission but its contract obligations having ceased early in 1929 it began on Feb. 5th to oppose the Florida Commission's efforts to

enforce the Cummer Scale in the Florida courts as above [fol. 408] stated, and on March 7th, 1929, intervened in this court as an active litigant. The scale has not been voluntarily maintained since Feb. 7, 1929.

The Cummer Scale has never applied to any other railroad in Florida, is only about one-half of the corresponding rates under Florida class P and about one-half of the rates on logs and comparable commodities in the same and similar territories. It is under the evidence shown to be so low as to be unremunerative to the carrier and to amount when enforced against the carrier's consent to a taking of property without due process of law. By consequence it is also unreasonable and unjust. (See I. C. C. report on similar evidence, #18354, July 5th, 1932.)

All the money collected by Atlantic Coast Line Railroad Company from the several claimants on their logs between Feb. 28, 1929, and March 7, 1931, was collected by virtue of the intrastate rates made by the Interstate Commerce Commission and upheld by this court. Shippers and carriers were not agreeing on any rate and no contract rate was involved.

[fol. 409] Conclusions of Law

Under the special circumstances of this case we have concluded that the restitution justly demandable may be reached without jurisdictional difficulty by putting an equitable condition upon the restitution granted. The claimants all admit that they are not entitled to be repaid the full sums paid to the Railroad Company, but only to so much as should not have been exacted. The payments were not made under process of this court nor directly by virtue of its judgment. This court erroneously refused to interfere while the misdirected power of the United States acting through the Interstate Commerce Commission exacted the payments. The court is thus not so much bound in honor and justice to restore what was taken without enquiry into the actual rights of the parties as it would be if its own officers had taken it. If a court of equity should erroneously refuse to enjoin a trespass and the trespass should be committed pending appeal, we greatly doubt the duty or power of the court afterwards to try the amount of damages done. Moreover, strict restitution is confined to the parties to the record, as is plainly stated in Bank of United States

vs. Washington, 6 Pet. 8, 9, and is to be made though the court be held to be without jurisdiction over the merits, the restitution then being a mere change of possession with no adjudication upon the rights of the parties. Northwestern Fuel Co. v. Brock, 139 U. S. 216. It is probably true that where the thing taken was taken directly under the court's judgment, and can be summarily and conveniently ascertained, it ought to be restored without stopping to enquire into ultimate rights. But in Northwestern Fuel Co. vs. Brock, where this was in fact done, cautious language was used, thus: "We are of opinion that the pro-[fol. 410] ceeding to enforce the restitution is under the control of the court, and that all needed enquiry can be had to guide its judgment in a summary proceeding upon motion of the parties, the only requisite being that the opposite party shall be heard, so that in directing restitution *no further wrong be committed.*" In Baltimore & Ohio R. R. Co. vs. United States, 279 U. S. 781, where, as in this case, the three-judge court had acted negatively, refusing to interfere with an order of the Interstate Commerce Commission, on reversal jurisdiction to award restitution was affirmed and the amount ascertained by a master. Only the parties to the record were involved, and there was no difficulty in measuring the amount to be returned, for it was the entire amount collected. There was no danger of doing further wrong. In Arkadelphia Co. vs. St. Louis & Southwestern R. R. Co., 249 U. S. 134, a three-judge court at the instance of the Railroad Company enjoined a state rate as confiscatory, requiring the statutory bond to repay the amount paid in excess of the enjoined rate. The reversal on appeal was held to entitle the shippers, not alone to enforce the bond but also to recover by way of restitution on transactions not covered by the bond. There was no uncertainty about the measure of the restitution because the amount collected established the one necessary figure in the calculation and the state rate which was upheld by the Appellate Court established the other. Shippers who were not parties to the record were allowed recovery by intervening before the master, the court saying, page 146: "The Railroad Commission, in defending the rate schedules against the attack of the Railway Company represents all shippers; the District Court properly held the Commission to be the representative of the shippers for this purpose."

In re Lincoln Gas Co., 256 U. S. 512, a gas company attacked [fol. 411] a city gas rate as confiscatory. The three-judge court first granted an interlocutory injunction, with bond to repay overcharges, but on final hearing upheld the rate, taking a supersedeas bond on appeal. There was no reversal, but a modification by making the decree one without prejudice. So restitution on reversal was not involved. But again it was held that consumers though not formal parties were represented by the municipality and its officers, and could intervene to collect overcharges under the bonds. By these authoritative precedents we are assured that we may on the reversal of a mere negative judgment award restitution and admit to its benefits the twenty-seven claimants who were not parties to the record except by representation through the Florida Railroad Commission. But we do not hold that in every case where injunction against a state or federal rate is erroneously refused that the court so far warrants the rate to the world that all shippers and carriers who do business under it pending the appeal are entitled to settle their accounts in the court. The number of shippers and carriers and the complexity of the situation may be such as to justify leaving them to their usual remedies to collect reparations, overcharges, or undercharges. Even the special jurisdiction to set aside in whole or in part a rate of the Interstate Commerce Commission with the broad right of intervention allowed by 28 U. S. C. A. 45a does not make the case so distinctly one in rem with all the world a party thereto that several such suits about the same rate may not exist concurrently. Kansas City Southern Ry Co. vs. United States, 282 U. S. 760. Restitution in cases like the present is rather a judicial duty to be performed according to the judgment and conscience of the court than a perfect right to be unconditionally demanded by the party. Indeed in Harger vs. Commissioners, 12 Pa. 251, a law case, it was said: "Resti- [fol. 412] tution is not of mere right, it is ex gratia, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it," and immediate restitution was refused. In Gould vs. McFall, 118 Pa. 455, the words were repeated, and restitution was refused because the court thought that the payments made on the reversed judgment were really made for reasons collateral to it. In Northwestern Fuel Co. vs.

Brock, supra, the caution is that the court do no further wrong thereby. In Arkadelphia Co. vs. St. L. & S. W. R. R. Co, the ground put forward for restitution in equity, page 145, is that it is a course of action thoroughly consistent with the principles of equity, and in Baltimore & Ohio R. R. Co. vs. United States, page 785, the application for restitution is called in effect an equity proceeding resulting in a final decree. Assuredly in a court of equity those who seek relief must do equity and accord to others their just rights. We therefore grant restitution, but not of the blind and instantaneous sort which settles nothing, but we condition it on a full enquiry which will do justice and give full and final relief to the parties.

The shippers here admit that their right is to have, not what they have paid, but what they have lost by the court's failure originally to enjoin the federal rate, the loss being the payment less what the carrier otherwise might at the time have collected. The Cummer Scale is prima facie what the carrier could have charged, but not conclusively so for several reasons. In the first place, being a Florida State rate, it must be tested by Florida law. According to the common law which is of force in Florida, except as changed by statute, a carrier's charges when not fixed by law or a contract are to be reasonable charges to be judged [fol. 413] by any court before which a controversy arises over them. 10 C. J., Carriers, § 694; Chicago, etc., R. R. vs. Iowa, 94 U. S. 161. By Comp. Gen. Laws of Florida of 1927, § 6698, common carriers are prohibited to charge more than a fair reasonable rate of toll or compensation. By § 6703, (1), (2), the Railroad Commission is directed to make reasonable and just rates of freight and passenger tariffs to be observed by all common carriers, and reasonable and just rules to enforce their observance. By § 6721 the Commissioners are required to make for each common carrier a schedule of just and reasonable rates on its lines, revising it as necessary from time to time, and it is enacted that the schedule "shall in all suits brought against any common carrier wherein is involved the rates of any common carrier for the transportation of freight, etc., be deemed and taken in all the courts of this state as prima facie evidence that the rates fixed in such schedule or schedules are just and reasonable rates." There is no special provision for testing or attacking the rates, but the general powers of the

courts alone are available. The first case arising under this statute, which was passed in 1889, was Pensacola & Atlantic R. R. Co. vs. Florida, 25 Fla. 310. In that case the Railroad Company, for which a passenger rate of three cents per mile had been prescribed, ignored it and charged a passenger about four and one-half cents. It was penalized by the Commission and suit brought in court to collect the penalty. The defense was that the rate was unjust and unreasonable because confiscatory. The Supreme Court held that the defense was good and that the effect of the statute was that in an action in court the rate schedule was to be taken as sufficient evidence of justness and reasonableness but not [fol. 414] to make it conclusive against judicial enquiry, and that there was thus provided merely a new method of proving reasonableness. In numerous cases since, touching penalties, mandamus to enforce rates, and injunctions against their enforcement to which the Commission was a party, it has been ruled that the Commission exceeds its powers in making an unreasonable or confiscatory rate, and that the rate fixed is only prima facie evidence of its reasonableness. Notwithstanding the comprehensive language of the statute above quoted, a plausible argument can be made that the rates were intended to be inconclusive only in litigation between the Commission and the carrier, and not in litigation between the carrier and a shipper. Yet in Cullen vs. S. A. L. R. R. Co., 63 Fla. 122, where the shipper sued the carrier as at common law for an overcharge, it was held that the action would lie and that the rates of the Commission were by the statute prima facie evidence of reasonableness in the case, thus applying the statute to cases in which the Commission was not a party To the same effect is La Floridienne vs. A. C. L. R. R. Co., 63 Fla. 208. Louisville & Nashville R. R. Co. vs. Speed-Parker, Inc., 137 So. 724, is cited as containing language comparing the Florida rates with those of the Interstate Commerce Commission in point of finality, but in that case the Commission rates were stipulated by the parties as applying, and there was no contest over their reasonableness but only over their construction. Moreover, the Florida statute differs materially from the Interstate Commerce Act. The latter as it stood in 1889, when the Florida statute was passed, contained a provision in § 14 that the findings of the Interstate Commerce Commission "shall thereafter in

all judicial proceedings be deemed prima facie evidence [fol. 415] as to each and every fact found," and in § 16 a like provision was repeated twice. While these provisions were of force, the findings were given only prima facie force. Texas & Pacific R. R. vs. I. C. C., 162 U. S. at page 239; Interstate Commerce Commission vs. Alabama Midland Ry., 168 U. S. at page 175. In subsequent revisions of the Act these provisions have been left out, and now appear only in § 16 (2) as to money awards and in § 19 (i) as to property valuations. We think the Florida rate schedule should have no more conclusive an effect in this court than in the courts of Florida, the more especially since the Florida Railroad Commission is a party here and can give the court the full benefit of its views and information. The Cummer Scale should have prima facie effect only.

Reference has been made to Rule 16 of the Commission, which adopts existing carrier rates and practices if not in conflict with the orders of the Commission and prohibits a change without application to the Commission. In its first aspect this rule would only effect an adoption of the Cummer Scale as a Commission rate if it were not already such. In its second aspect while providing an orderly procedure that ought ordinarily to be pursued, we think that inasmuch as the Cummer Scale had been in contention for years prior to Feb. 8, 1929, and on that date was the issue in the case brought by the Florida Commission against the Atlantic Coast Line Railroad then pending in the State court, the absence of the formality of asking permission to revoke the Cummer Scale may be considered immaterial. Particularly is this true since the issue is that the Scale is confiscatory and in violation of the Constitutions of Florida and of the United States. If it is, it ought not to be en- [fol. 416] forced for a single day over the carrier's protest.

And this brings us to a reason independent of the statutes of Florida for considering the Cummer Scale an improper measure of restitution in that it is confiscatory and void. The Florida Commission in 1914 thought it too low to be compensatory. The Interstate Commerce Commission has twice so held it to be. This court in this litigation has thus expressed itself. Our master in considering the evidence produced on this exact issue has so concluded. We agree with him. The rate has never been enforceable since the Atlantic Coast Line Company repudiated it. But for the

erroneous action of this court, the Railroad Company might have attacked it for this cause in February, 1929, by the usual proceedings in the case then pending in the State court, or in that also pending in the Federal court in Florida. The erroneous judgment of this court was no doubt the reason why it was not done. The point is that there can be no certainty that the shippers really lost everything paid above the Cummer Scale by the judgments of this court because the Cummer Scale was invalid and the carrier had the right to refuse, and in all likelihood would have refused, to do business under it if this court had set aside the Interstate Commerce Commission rate which superseded it. The situation is quite different from that in Arkadelphia Co. v. St. Louis & San Francisco Co., and In Re Lincoln Gas Company, where the former state rate was applied because in each case it was that rate which had been in contest and had been upheld as the final result of the litigation. While the decrees left the question of validity open to attack by a future suit so far as the future operation of the rate was concerned if confiscation could then be shown, the rate was held valid for the past and controlled the restitution. In the Arkadelphia case, at page 148, we [fol. 417] find it assumed on authorities cited, though not decided, that in spite of the adverse result in the main suit the Railroad Companies could in the restitution proceedings assert as to particular shippers that the rate was discriminatory and void. Only because it was not proven that the discrimination in fact amounted to unconstitutional deprivation of equal protection of the laws the contention was set aside. In the case of Baltimore & Ohio R. R. vs. United States, no question of the measure of restitution arose. In the present case the Cummer Scale was only indirectly in issue, and the Supreme Court in reversing did not uphold its validity but refused to look into the evidence of its sufficiency at all. It merely held that the Interstate Commerce Commission had not found distinctly enough the facts which would permit it to meddle with the state rate. No tribunal which has ever considered the Cummer Scale has upheld it. We hold the Constitutional invalidity of the Cummer Scale is fatal to its use in measuring an equitable restitution.

Another contention is that the Cummer Scale was in fact suspended by the Florida Commission itself during the

period in controversy by its Orders Nos. 979 and 990, and particularly the latter. Probably these orders, like an Act of the Legislature or the judgment of a court, should be interpreted rather by the effective words than by the preamble or the reasons given. The effective words of Order No. 990 are strong for an actual suspension of the state rates rather than a mere suspension of punitive hostilities to enforce them. But it is said that as suspensive orders, which are not directly provided for by statute, amount to a temporary change of the rates and should be preceded by [fol. 418] notice to the interested parties under §§ 6722 and 6723 of the statutes, these are void. To this the Railroad Company replies that it is making no point of want of notice to itself, and that the claimants of restitution are the only other interested parties, and they were at the time represented by the Commission itself which had already by its pleadings declared an ultimate purpose to collect for them this restitution, and that the complainants were further notified in that one of their counsel helped to draw Order No. 990. We content ourselves with stating these issues, and do not definitely decide them, since we think [illegible] what has preceded sufficiently disposes of the Cummer Sc[illegible].

Like the master, we think the class P rates cannot be applied unless as evidence by comparison of what is reasonable. In establishing them the Commission excepted the Atlantic Coast Line Railroad, it already having the Cummer Scale. Class P rates have not the prima facie force of Commission rates for that railroad.

There remains only the common law standard of reasonableness as fixed by the court to be applied. Its application is not rate-making. We have held that we have no jurisdiction in this case to enjoin or set aside a state rate. A Commission rate is a legislative act made through a deputy, a law of commerce, having only a prospective operation. The ascertainment of a past overcharge is a judicial act in which law is applied, not made. Louisville & Nashville R. R. vs. Garrett, 231 U. S. 299; Prentis vs. A. C. L. Co., 211 U. S. 210; Reagan vs. Farmers Loan & Trust Co., 154 U. S. 362, 397. This latter is the thing we will require the master to do on a re-reference, wherein he may consider as evidence for comparison other rates established by due [fol. 419] authority as well as other evidence hitherto

taken by him and such as may hereafter be offered on this point by either party. It is the ancient issue of quantum meruit. Other issues already decided by him stand closed. An order of re-reference will be taken accordingly.

Sam'l H. Sibley, Circuit Judge; Wm. H. Barrett, District Judge.

I respectively dissent, except I concur in the finding of fact that the rates of the Cummer Scale, if not consented to or acquiesced in by the Atlantic Coast Line Railroad but enforced over its opposition, would be confiscatory.

E. Marvin Underwood, District Judge.

[fol. 420] [File endorsement omitted.]

[fol. 421] IN UNITED STATES DISTRICT COURT

No. 514, No. 511, No. 512

[Titles omitted]

ORDER OVERRULING EXCEPTIONS AND RECOMMITTING MATTER TO MASTER—Filed January 30, 1933

[fol. 422] Upon considering the master's report and the exceptions thereto, It Is Ordered that the exceptions be overruled and the report confirmed so far as it has gone and except as modified by conclusions of law and fact filed herewith. Under the special circumstances of this case we adjudge that the claimants of restitution should have the same only upon condition that they submit to an investigation of the true rights of the carrier to collect for the transportation of their logs during the period covered by the restitution, and submit to such an adjudication as will justly and finally settle the accounts between such claimants and the carrier. To this end we recommit this matter to the master, with direction that he ascertain whether the charge made by the carrier for transportation in each instance was a reasonable one as measured by common law standard, and if not, what was the reasonable charge to be made, and that he measure and award to each claimant restitution accordingly. The master may consider all evidence hitherto taken by him bearing upon the

reasonableness of the charge to be made, and may receive such additional evidence as either party may desire to offer thereon.

We further, upon the master's application for compensation, now award a sum of $5,000.00 to be in full of all services hitherto or hereafter rendered by him, to be paid one-half by the Atlantic Coast Line Railroad Company and the other half by the several claimants for restitution in such proportion as they may agree upon or as may be hereafter fixed by the court. The several parties liable are directed to pay one-half of the compensation thus awarded at once, and the remainder upon the rendering of the final report.

Sam'l H. Sibley, Circuit Judge, Wm. H. Barrett, District Judge.

[fol. 423] I respectfully dissent, except that I concur in the finding of fact that the rates of the Cummer Scale, if not consented to or acquiesced in by the Atlantic Coast Line Railroad but enforced over its opposition would be confiscatory, and except that I concur in allowance of Masters' compensation.

E. Marvin Underwood, U. S. District Judge.

[fol. 424] [File endorsement omitted.]

[fol. 425] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR DECREE ON MASTER'S REPORT—Filed March 15, 1933

To the Honorable the Judges of the United States District Court for the Northern District of Georgia:

Now comes the Atlantic Coast Line Railroad Company, and respectfully represents unto this Honorable Court as follows:

1

In the above mentioned proceedings Nos. 511 and 512, the complainants are seeking restitution from Atlantic

Coast Line in their own behalf, and in proceeding No. 514 the State of Florida and the Florida Railroad Commissioners are seeking restitution of the Atlantic Coast Line on behalf of various shippers.

[fol. 426] The said claims for restitution were referred by this Court to the Honorable Horace Holden, as special master; were heard and considered by him, and he made his report as such special master on the 14th day of November, 1932. He found that the amounts of the claims of certain claimants had been established by agreement between the parties on the basis of the difference between the sums which were collected under the scale of rates prescribed by the Interstate Commerce Commission and the sums which would have been collected under the scale of rates known in these proceedings as the Cummer scale of rates. Said agreement as to the amounts of these claims was made without, however, admitting that the Atlantic Coast Line was indebted to any of said claimants in any sum whatsoever. The special master also found, in effect, that the Cummer scale of rates was unjust, unreasonable and confiscatory and that Atlantic Coast Line Railroad Company could not be required to make restitution upon the basis asserted by the claimants, which was that the said Cummer scale of rates was just and reasonable.

2

(a) Said claims for restitution grow out of the following circumstances:

The Interstate Commerce Commission, by its order entered August 2, 1928, as amended, in its docket No. 18364, fixed rates for the transportation of certain kinds of logs [fol. 427] in the State of Florida over the Atlantic Coast Line Railroad for distances up to 170 miles. Those rates were higher than those which were being charged under the scale of rates on file with the Florida Commission and which latter scale is known as the Cummer scale of rates. In the litigation which followed over the said order of the Interstate Commission in cases Nos. 511, 512 and 514 in this court and hereinabove entitled, this court held that the said order of the Interstate Commission was lawful and refused to enjoin it. Thereupon the said order of the Interstate Commission went into effect on February 8, 1929.

The Supreme Court of the United States, on appeal, adjudged that the Interstate Commission's order should have been set aside because it was not based upon sufficient findings of fact, all of which is more fully set out in the proceedings in these causes. Mandate was issued out of the said Supreme Court and its judgment was made the judgment of this court on March 7, 1931.

[fol. 428] (b) The claimants based their claims for restitution, as hereinbefore stated, on the difference between the sums collected under the scale of rates fixed by the Interstate Commission during the period they were applied—February 8, 1929, to March, 1931—and the sums which would have been collected had the aforesaid Cummer scale of rates been applied. Claimants asserted that the said Cummer scale of rates was the just and reasonable scale for such service at the time it was rendered. The special master found against that claim.

(c) Hearings were had on said claims by said special master, much evidence was taken and the special master made his report on the 14th day of November, 1932. Exceptions were filed thereto and were heard by this court on December 5, 1932.

(d) This court affirmed the finding of the special master to the effect that the Cummer scale of rates was unjust, unreasonable and confiscatory and could not be used for the purpose of ascertaining whether or not the Atlantic Coast Line Railroad Company owed the complainants and the others for whom restitution is sought, anything on account of said claims.

It is respectfully submitted that there should then have been a decree entered against the claimants and in favor of Atlantic Coast Line, holding that the Coast Line was not indebted to claimants in any sum whatsoever.

[fol. 429] (e) The court re-referred the said causes to the special master by its order entered January 30, 1933. A part of said order is as follows:

"Upon considering the master's report and the exceptions thereto, It Is Ordered that the exceptions be overruled and the report confirmed so far as it has gone and except as modified by conclusions of law and fact filed

herewith. Under the special circumstances of this case we adjudge that the claimants of restitution should have the same only upon condition that they subject to an investigation of the true rights of the carrier to collect for the transportation of their logs during the period covered by the restitution, and submit to such an adjudication as will justly and finally settle the accounts between such claimants and the carrier. To this end we recommit this matter to the master, with direction that he ascertain whether the charge made by the carrier for transportation in each instance was a reasonable one as measured by common law standard, and if not, what was the reasonable charge to be made, and that he measure and award to each claimant restitution accordingly. The master may consider all evidence hitherto taken by him bearing upon the reasonableness of the charge to be made, and may receive such additional evidence as either party may desire to offer thereon."

The aforementioned report of the special master, the exceptions thereto, the order of this Court and the conclusions of law and fact therein mentioned, are of file in these proceedings and are referred to, and by reference made a part hereof.

3

[fol. 430] Atlantic Coast Line respectfully alleges that after the rendition of the aforementioned opinion and order by the Supreme Court of the United States, the Atlantic Coast Line filed its motion with the Interstate Commission to reopen the proceedings before the Commission in its Docket No. 18364; and likewise the Georgia Public Service Commission, the original complainant in said proceeding, filed its motion that the said proceeding be reopened. Said proceeding was reopened and hearings were had thereon, extensive evidence taken, and arguments had, and a report and order thereon made; these will be hereinafter referred to.

4

When the Atlantic Coast Line Railroad Company, in response to the proceedings which have been herein described, ceased charging for the transportation service rendered by it in hauling logs intrastate in Florida, based

on the scale of rates which had been fixed by the Interstate Commerce Commission, and returned to the scale of rates which the State of Florida and its Railroad Commissioners and the other complainants and claimants herein claimed to be the legal scale of rates; that is, the Cummer scale of rates, it issued notice to all shippers and con-
[fol. 431] signee of saw mill logs over six feet in length moving over the lines of Atlantic Coast Line, including therein, all of the claimants who are now asserting the right of restitution against the Atlantic Coast Line, a notice, in substance as follows;

"Until further notice, the Atlantic Coast Line Railroad Company will transport logs (except cedar and except ash, gum, hickory, oak, pine and cypress logs, not over six feet in length) for distances 170 miles and under, presently collecting therefor on basis of the mileage scale of rates (Cummer scale) formerly published at top of page 413 of Agent Glenn's ICC A-659 (Southern Lumber Tariff) ACL RR's Freight Tariff No. 10930, but you are now advised if the scale of rates just referred to is not the applicable rate or rates now in effect, the Atlantic Coast Line Railroad Company will later make demand for revenue based on the applicable rates."

5

All of the shipments of logs thereafter made intrastate in Florida over the lines of the Atlantic Coast Line, at the rates known as the Cummer scale of rates, by those who are now claiming restitution against Atlantic Coast Line Railroad Company, were made under protest and under notice to the claimants by the Atlantic Coast Line Railroad Company that it would later claim of them and all other shippers, if the Cummer scale of rates was not the applicable scale, additional revenue on the basis of the applicable scale of rates.

[fol. 432] The transportation of logs by the Atlantic Coast Line intrastate in Florida, subsequent to the reestablishment of the Cummer scale proceeding on that basis until February 25, 1933.

6

The aforementioned petition of the Atlantic Coast Line Railroad Company and also the petition of the Georgia

Public Service Commission to the Interstate Commerce Commission, to reopen the proceeding before it in its Docket No. 18864, were filed on or about the 5th day of March, 1931; and the complainants in each of the above entitled cases filed their objections to the granting of said petitions. None-the-less, the said proceeding was reopened by order of the Interstate Commission entered the 6th day of April, 1931. Said cause before the Commission then proceeded to hearing, to the taking of evidence and to the final ascertainment by the Interstate Commerce Commission, with the result that on the 5th day of July, 1932, the Commission made its report and entered its order reaffirming its previous findings and fixing a scale of rates for the transportation of logs intrastate in Florida over the lines of the Atlantic Coast Line for *for* distances up to [fol. 433] 170 miles, exactly the same as the scale of rates which it had fixed in its order of August 2, 1928; which rates were collected by the Atlantic Coast Line for the transportation of logs during the period involved in these claims for restitution (February 8, 1929, to March, 1931). The Interstate Commerce Commission found in each of its reports that the Cummer scale of rates was unjust, unreasonable, and discriminatory against interestate commerce.

Petitions by the complainants were filed with the Interstate Commission, after the entering of said last mentioned order of July 5, 1932, to reopen said proceedings, and the same were denied.

7

(a) Thereupon the complainants brought their bills in this court being numbers 690, 691 and 695 in equity, for the purpose of restraining said order of the Interstate Commerce Commission, entered on the 5th day of July, 1932, as amended.

(b) Said petitions were heard before this court on the 14th day of September, 1932, and the court suspended the order of the Interstate Commission for a period not exceeding sixty days.

[fol. 434] (c) In the meantime, pending decision by this court, further applications were made to the Interstate Commission by the complainants in cases Nos. 690, 691 and 695, on the basis of newly discovered evidence, which con-

sisted of certain new tariffs which had been filed and which the complainants claimed to be relevant and sufficiently forceful to cause the Interstate Commission to alter its previous reports and orders. Said case was reopened by the Commission on October 21, 1932; and further hearing was had therein on November 21-22, 1932; and on January 9, 1933 the Commission made a report and order, again reaffirming its prior reports and declining to set aside its previous orders.

(d) Complainants then filed petitions to the Interstate Commerce Commission for the reopening of said proceeding and the reconsideration thereof. Each of those petitions was denied by the Commission.

(e) Supplemental bills of complaint were then filed in causes Nos. 690, 691 and 695 in this court, seeking to set aside the said orders of the Interstate Commission. Hearing was had thereon on February 24, 1933 and this court entered its orders declining to interfere with the orders of [fol. 435] the Interstate Commerce Commission; and the scale of rates prescribed by the order of the Interstate Commission of July 5, 1932, as amended July 28, 1932, went into effect on February 25, 1933, and is now in effect.

8

The scale of rates which went into effect on February 25, 1933 is the same as that charges by the Atlantic Coast Line during the period beginning February 8, 1929 and ending March, 1931 and on which the claims for restitution are based, as hereinbefore set out.

During the period, beginning with the discontinuance of the use of the scale of rates prescribed by the Interstate Commission in its order of August 2, 1928, as amended—March, 1931 to February 25, 1933—a period of nearly two years, the Atlantic Coast Line Railroad Company has been required by the claimants to transport logs for the claimants, including those represented by the Florida Railroad Commission, over its lines intrastate in Florida for distances up to 170 miles, and receive therefor sums based on the Cummer scale of rates, which scale has been adjudged by this court to be unjust, unreasonable, and confiscatory; [fol. 436] and by the Interstate Commission to be unjust, unreasonable, and discriminatory against interstate commerce.

The decree of this court, entered on the hearing had on February 24, 1933, hereinabove referred to came after the order of re-reference to the special master, entered on January 30, 1933, in the restitution proceedings.

9

(a) Atlantic Coast Line Railroad Company respectfully avers that it was unjust and unreasonable for the complainants, including therein the State of Florida, and the Florida Railroad Commissioners, and the claimants represented by them, to have required it to have rendered transportation service under a scale of rates which was unjust, unreasonable, confiscatory and discriminatory against interstate commerce; that it protested against the rendering of such service under said scale of rates; and asserted to the claimants who required such services, that it would seek a correct accounting based upon the applicable scale of rates at the proper time. The claimants in this case required the said transportation services of Atlantic Coast Line for the hauling of logs over its lines intrastate in Florida for distances up to 170 miles in those conditions and upon the terms of that notice and protest.

[fol. 437] (b) It has been determined, as hereinbefore set out, by the Interstate Commerce Commission, and by this court, that the scale of rates which the Atlantic Coast Line was required to apply since the order of this court in March, 1931, was unjust, unreasonable and unlawfully discriminatory against interstate commerce; and therefore, was not the applicable scale of rates to be applied to such transportation service. The said scale of rates has also been determined to be confiscatory.

(c) The Atlantic Coast Line respectfully represents that the further proceedings under the order of this court, entered on January 30, 1933, and hereinbefore referred to, require the fixing by the court of a rate or charge for transportation services rendered for the claimants by the Atlantic Coast Line in transporting logs intrastate in Florida over its lines for distances not in excess of 170 miles, during the period from February 8, 1929, to Mar. 8, 1931; on a basis in excess of the Cummer scale of rates.

The rate to be fixed must be a just and reasonable one and one which is not unjustly discriminatory against inter-

state commerce, within the meaning of sections 3 and 13 of the Act of Congress known as the Interstate Commerce Act. This involves the determination by the court of the following factors:

[fol. 438] (a) What is the just and reasonable rate for the period involved in the claims for restitution?

(b) What is the rate which, being just and reasonable, is not unjustly discriminatory against interstate commerce during that period, within the meaning of the Act of Congress known as the Act to Regulate Commerce?

During the period involved this subject matter was within the jurisdiction of the Interstate Commerce Commission, and the said Commission was then in the act of exercising that jurisdiction, as has been herein set out.

It is respectfully submitted that, in these circumstances, the court cannot, in the first instance, determine the said question and fix such rates, but that the same are for at least preliminary determination by the Interstate Commerce Commission; and until the Interstate Commerce Commission shall have determined whether the Atlantic Coast Line made any overcharge against the claimants, or any of them, and the amount of such overcharge, if any was so made, the court should not undertake to fix the rate which should have been applied during the period covered by the claims for restitution.

The determination of the reasonableness and justness of a rate and whether the same is unjustly discriminatory against interstate commerce is, in the first instance, for the administrative or legislative body; in this instance, the Interstate Commerce Commission.

[fol. 439]

9a

Atlantic Coast Line Railroad Company respectfully represents that the order of re-reference to the special master entered by this court on January 30, 1933, should be revoked and decree should be entered upon the report of the master, finding that Atlantic Coast Line Railroad Company is not indebted to the claimants in any sum whatsoever.

10

In the event the court should not maintain the position of Atlantic Coast Line Railroad Company as hereinabove

set out, but maintains the position that it has jurisidiction to fix the rate to be charged during the period for which restitution is claimed by the claimants in the claims filed by them for the transportation service rendered for them, then Atlantic Coast Line respectfully represents that:

(a) It is uncertain as to whether the order of this court of January 30, 1933, re-referring these cases to the special master permits it to have such an accounting of the claims as will take into consideration the rights of the Atlantic Coast Line Railroad Company arising since the entering by this Court of the mandate of the Supreme Court of the United States in March, 1931, as hereinabove referred to; [fol. 440] and which rights are based upon the facts herein set out, wherein the Atlantic Coast Line Railroad Company was required to render and did render to the claimants transportation service in the hauling of logs over its lines intrastate in Florida on the unjust, unreasonable and discriminatory scale of rates described as the Cummer Scale, whereas it should have had for such service a just, reasonable and non-discriminatory scale of rates; which just and reasonable and non-discriminatory scale the Atlantic Coast Line asserts to have been the scale fixed by the Interstate Commission by its order of August 2, 1928, re-affirmed by its orders of July 5, 1932, as amened, and January 9, 1933.

(b) Unless complainants are required to submit to an accounting for the transportation service so rendered to them and each of them respectively, after the entering of said mandate in March 1931, which transportation service was paid for by the claimants on the basis of the unjust, unreasonable, confiscatory and discriminatory scale of rates known as the Cummer Scale, the Atlantic Coast Line Railroad Company will have been required to render transportation service over its protest at a scale of rates which has been determined in this proceeding by this court, and also by the Interstate Commerce Commission to have been unjust, unreasonable, confiscatory, and unjustly discriminatory against interstate commerce.

[fol. 441] 11

Atlantic Coast Line respectfully avers that in order to do complete equity in these causes, it is necessary that the complainants and all other claimants, including those rep-

resented by the State of Florida and its Railroad Commission, submit to an investigation of the true rights of the carrier to collect for the transportation of their logs not only during the period covered by the restitutions but also by the period covered from the effective date of the restored Cummer scale of rates, which was in March 1931; to the date on which the scale of rates fixed by the Interstate Commission was restored, to-wit: February 25, 1933; and submit to such an adjudication as will justly and finally settle the accounts between such claimants and the carrier.

12

In the event this court holds that it has the right and jurisdiction to fix the reasonable, just and nondiscriminatory rates to be applied during the periods involved, then Atlantic Coast Line Railroad Company desires to be allowed to file with the court and the special master, a statement as to the transportation service rendered by it, intrastate in Florida, during the latter period (March, 1931, to February 25, 1933) to any of the persons who are now claimants or who may become claimants for restitution against it, showing the date of each shipment, the name of [fol. 442] the shipper, the name of the consignee, point of origin, point of destination, and the sum which was collected under the Cummer scale of rates and the sum which would have been collected on each shipment under a just, reasonable and non-discriminatory scale; which just, reasonable and non-discriminatory scale Atlantic Coast Line represents that during the period of that service to have been the scale of rates fixed by the Interstate Commission, and hereinabove referred to; thereupon an accounting to be had between the Atlantic Coast Line Railroad Company and the said claimants, and each of them; and that Atlantic Coast Line be allowed to recover against said claimants, and each of them, the difference between the rates paid by them respectively for transportation services rendered to them and to each of them, and the reasonable value of such service.

13

If this court determines that it has not the right to fix the just, reasonable and non-discriminatory rates to be applied to the transportation rendered during said period—March, 1931, to February 25, 1933—during which period

[fol. 443] the Atlantic Coast Line was required, in the circumstances herein described, to render the service described herein to said claimants at the unjust, unreasonable and discriminatory rates known as the Cummer scale; then the Atlantic Coast Line desires that this proceeding be suspended until it can submit to the Interstate Commerce Commission its claims against said claimants and the said Commission shall fix the scale of rates which are just, reasonable and non-discriminatory to be applied for the service rendered during said period.

14

Wherefore, Atlantic Coast Line Railroad Company respectfully prays:

(a) That the order of re-reference to the special master in these causes be revoked and that decree be entered on the report of the special master determining that Atlantic Coast Line Railroad Company is not liable to the claimants in any sum whatsoever.

(b) That in the event the order of re-reference is not revoked and decree entered as aforesaid, that these proceedings be deferred until the claimants shall have submitted their claims to the Interstate Commerce Commission for ascertainment as to whether or not there was overcharge during the period involved and if so the extent of same.

[fol. 444] (c) In the event the court denies the prayers contained in paragraphs (a) and (b) hereof, then Atlantic Coast Line prays that the order of re-reference to the special master in these causes, be construed or amended in accordance with the allegations of this petition, so as to permit the Atlantic Coast Line to file a statement of the transportation service rendered by it in hauling logs intrastate in Florida for each of the claimants, after this court had entered the mandate of the Supreme Court of the United States, herein described in March, 1931, and continuing thereafter until February 25, 1933; and that there be an investigation before the special master of the true rights of the carrier to collect for said transportation service, not only during the period beginning with February 8, 1929, and ending in March, 1931, but also for the period beginning in March, 1931, and ending February 25, 1933.

(d) In such event that the claimants be required to submit to such an adjudication as will justly and finally settle

the accounts between them and the Atlantic Coast Line Railroad Company, as to both of said periods.

[fol. 445] (e) That in such event the Atlantic Coast Line Railroad Company be allowed to recover against the respective claimants for such transportation service rendered by it to them during the period beginning March, 1931, and ending February 25, 1933, the difference between the sums which it collected under the Cummer Scale of rates and the sums which it would have collected for such service under a just and reasonable scale of rates.

(f) That in such event the Atlantic Coast Line Railroad Company have judgment against the respective claimants for the amounts due it for said transportation service rendered by it to the several claimants respectively during said latter period from March, 1931, to February 25, 1933, on the basis of the difference between the sums collected, in the circumstances herein set out, under the so-called Cummer Scale of rates and a reasonable just and non-discriminatory scale.

(g) Atlantic Coast Line Railroad Company respectively prays for such other, further and general relief as may be meet and proper in the premises.

Respectfully submitted, Atlantic Coast Line Railroad Company, by Carl H. Davis, W. E. Kay, Robert C. Alston, Wm. H. Sibley, its Attorneys.

[fols. 446 & 447] *Duly sworn to by Geo. B. Elliott. Jurat omitted in printing.*

[fol. 448] IN UNITED STATES DISTRICT COURT

No. 514

[Title omitted]

MOTION TO STRIKE—Filed March 21, 1933

The complainant in the above entitled cause, appearing specially for the purpose of this motion and for no other purpose, moves the Court to strike from the files herein the petition dated March 7, 1933, of Atlantic Coast Line Railroad Company, presented to the above entitled Court

in the above entitled cause, and each and every paragraph and part of said petition, severally, upon the following grounds, to-wit:

1. That neither the laws of Congress nor the Rules or Practice of Federal Courts of Equity authorize or permit the jurisdiction of this Court to be invoked in the way in which or by the means by which the petitioner seeks to invoke it.

[fol. 449] 2. This this specially constituted statutory Court is without jurisdiction to consider all or any of the matters and things set forth in said petition.

3. That this Court is without jurisdiction to grant relief in this cause save to grant restitution to the complainant consequent upon the failure of this Court to enter the right decree in the first instance, and on March 7th, 1931, this Court entered the decree which it should have entered in the first instance, and this Court is without jurisdiction to hear or determine any controversy arising between the parties after said date.

4. That this Court is without jurisdiction to grant the relief or any of the relief prayed in or by said petition.

Cary D. Landis, Attorney General of the State of Florida. Theo. T. Turnbull, Special Counsel for Florida Railroad Commission.

[Similar motions to strike filed in two constituent causes are omitted in printing.]

[fols. 450-456] [File endorsement omitted.]

[fol. 457] IN UNITED STATES DISTRICT COURT

No. 511. No. 512. No. 514

[Title omitted]

ORDER DENYING MOTION OF ATLANTIC COAST LINE RAILROAD COMPANY TO REOPEN THE ORDER OF REFERENCE ENTERED ON JANUARY 30, 1933—Filed March 21, 1933.

We have heretofore decided in these cases that these proceedings to set aside an order of the Interstate Com-

merce Commission cannot be expanded into something else. We have no general jurisdiction to adjust accounts between the carrier involved and its patrons. We have sustained our jurisdiction to make restitution for the period covered by our erroneous refusal to enjoin the attacked order, and this alone under the equitable conditions which we imposed is now before the Master. We do not feel justified in en- [fol. 458] larging the jurisdiction beyond the scope set forth in the previous order of reference. The motion to reopen the order of re-reference to the Master is denied.

This March 20, 1933.

Saml. H. Sibley, United States Circuit Judge. Wm. H. Barrett, United States District Judge. E. Marvin Underwood, United States District Judge.

[fol. 459] [File endorsement omitted.]

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[fol. 462] In United States District Court

No. 514. No. 511. No. 512

[Title omitted]

Report of Horace M. Holden, Special Master, Appointed by the Court in the Above Stated Case—Filed Nov. 7, 1933

Statement of Facts

For many years there existed in Florida what is known as the Cummer scale of rates charged by Atlantic Coast Line Railroad in Florida for shipment of logs of a specified kind up to 170 miles, which were less than half of the inter-

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[fol. 463] state rates and on May 3, 1926, the Georgia Public Service Commission filed its petition with the Interstate Commerce Commission claiming that the intrastate rates were preferential to intrastate shippers, discriminatory as to persons and localities, unduly discriminatory against interstate shippers from Florida to Georgia and were a burden on interstate commerce. The Georgia Commission asked that reasonable, non-discriminatory and non-prejudicial rates be ordered.

On August 2, 1928 the Interstate Commerce Commission passed an order establishing interstate rates from North Florida for distances up to 170 miles to destinations in Georgia as reasonable rates for interstate transportation of logs and also made provision in the order to the effect that existing intrastate rates for corresponding distances in Florida should be the same and the Atlantic Coast Line accordingly filed and published a schedule of rates fixed by the order.

Bills were filed by the claimants in the cases above referred to, which were consolidated, wherein claimants sought an injunction against the enforcement of the order. This Court rendered a decree finding that the order of the Interstate Commerce Commission was valid, and refused the injunction. Claimants carried the case to the Supreme Court of the United States, which held the order of the Interstate Commerce Commission invalid because of the lack of "basic and essential findings" necessary to support it and reversed the decree of this Court sustaining it.

Claimants asked for a decree of the Court in accordance with the mandates issued by the Supreme Court and made motions for an order of restitution. Claimants, in said motions, sought to recover from the Atlantic Coast Line Railroad the difference between the amounts they paid it

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[fol. 464] from February 8, 1929, to March 7, 1931, for Shipments of logs according to the rates fixed by the Interstate Commerce Commission's order, and the amount which should have been charged, and would have been collected under the Cummer scale with interest at the rate of 8% per annum from the date each shipment was actually made by them.

The undersigned was appointed Special Master to hear testimony and make report of his findings of fact and law as specified in the order appointing him. This order provided that the Master determine the amount of overcharges, if any, "as measured by the difference between the amount collected, and the established lawful rate in Florida at the time each shipment was made, as the Master may find it to have been."

Upon the hearing the Master found that there was no established lawful rate in force at the time any shipment of logs, hereinbefore referred to, was made, during the period in question, on the ground that the only established rate as to intrastate shipments in Florida of logs of the kind referred to during the period was the Cummer scale, which was invalid because it was so low as to be unjust and unreasonable and did not furnish adequate return on properties used.

The Master in his report made many other findings, one of which was as follows:

"There being no lawful established rate in Florida for the transportation of logs hereinbefore referred to from February 8, 1929, to March 5, 1931, and the rates charged by the Atlantic Coast Line Railroad Company during this period having been charged without any lawful authority, this Court has the right in this proceeding to find and adjudge whether the rates charged by the Atlantic Coast Line Railroad Company during this period were unreasonable and if found unreasonable to further find and adjudge what would be the proper rate to have been charged during the period in question. And if the same is lower than

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[fol. 465] the rate charged by the Atlantic Coast Line Railroad Company to render a decree against the Railroad Company for the amount of overcharge during the period in question."

The Master found that he was without authority under the order appointing him to deal with this feature and make findings with reference thereto. The Court sustained the findings of the Master and by order referred the case to him again.

In the order of re-reference the Court said:

"We recommit this matter to the master, with direction that he ascertain whether the charge made by the carrier for transportation in each instance was a reasonable one as measured by the common law standard, and if not, what was the reasonable charge to be made, and that he measure and award to each claimant restitution accordingly."

1

Election of Remedies

In the opinion of the Court dealing with the previous report, it says:

"Assuredly in a court of equity those who seek relief must do equity and accord to others their just rights. We therefore grant restitution, but not of the blind and instantaneous sort which settles nothing, but we condition it on a full inquiry which will do justice and give full and final relief to the parties."

In the order of re-reference the Court says:

"Under the special circumstances of this case we adjudge that the claimants of restitution should have the same

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[fol. 466] only upon condition that they submit to an investigation of the true rights of the carrier to collect for the transportation of their logs during the period covered by the restitution, and submit to such an adjudication as will justly and finally settle the accounts between such claimants and the carrier. To this end we recommit the matter to the master, with direction that he ascertain whether the charge made by the carrier for transportation in each instance was a reasonable one as measured by the common law standard, and if not, what was the reasonable charge to be made, and that he measure and award to each claimant restitution accordingly. The master may consider all evidence hitherto taken by him bearing upon the reasonableness of the charge to be made, and may receive such additional evidence as either party may desire to offer thereon."

At the first hearing under the order of re-reference and before any testimony was taken, counsel for claimants and defendant made several statements. Counsel for claimants made the first statement, which appears in the record, pages 1, et seq., wherein in substance it was said that claimants expected to proceed with the investigation before the Master, but reserved their right to except to the previous findings of the Master and the decree of the Court thereon.

Counsel for defendant protested against the right of claimants to proceed with this investigation under statements made by their counsel.

The Master at the time made a statement, the meaning and effect of which was that the Master should proceed with the hearing and investigation and make report without undertaking to make decision as to the effect of so doing, or the effect of statements of counsel and leave such decision to the Court. In one of the statements of counsel for claimants it was stated that they expected to except to the ruling of the Court in the first sentence in the language of the Court above quoted. The Master should not undertake to review a ruling of the Court in the order appointing him.

[fol. 467] 6

The Master feels that his ruling and action at the time were proper, and that he should have proceeded with the investigation, leaving to the Court for determination the effect of doing so and the statements of counsel for claimants and their willingness and desire to proceed with the investigation before the Master, with and under the statements made by counsel.

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When the first finding of the Interstate Commerce Commission, made August 2, 1928, was confirmed by this Court, the Atlantic Coast Line Railroad filed the schedule of rates fixed by the Interstate Commerce Commission, which became effective February 8, 1929. It is true that the order fixing the rates appearing in the schedule filed by the defendant and the decree of the Court sustaining the findings of the Commission can afford no protection to the defendant in making the charges referred to in the schedules filed; at the same time, collections were made under these tariffs beginning February 8, 1929, and they are presumed to have been under proper charges.

The burden is upon the claimants to show that they were not just and reasonable charges, and were extortionate and oppressive and upon their failure to do so they would not be entitled to any recovery. (See Centre County Lime Co. v. Public Service Commission, 157 Atl., 815-819.) Should claimants carry this burden and make such showing the

burden is also upon the claimants to further show what would have been just and reasonable charges before any recovery can be had.

The Cummer Scale was presumed to be just and reasonable and proper charges, but in the former report of the Master was found to be unjust and unreasonable, and this

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[fol. 468] finding has been confirmed by the Court. The Cummer Scale, declared invalid as above stated, was the only established intrastate rate at the time defendant filed and published its schedules to become of force on February 8, 1929. When there is no lawful established rate a Railroad Company can make such freight charges as it thinks proper at the time of each shipment, or—which is the same thing—make charges for shipments when made in accordance with a schedule previously filed and published, but if such charges are not lawful charges the shipper has the right upon proper proof to recover the difference between the amount collected from him and what would have been collected under just and reasonable charges, at the time.

3

What Law, or Rules, are Binding or of Force in Fixing Charges for Past Shipments

In the opinion of the Court in regard to the re-reference, the Court says:

"The shippers here admit that their right is to have, not what they have paid, but what they have lost by the court's failure originally to enjoin the federal rate, the loss being the payment less what the carrier otherwise might at the time have collected. The Cummer scale is prima facie what the carrier could have charged, but not conclusively so for several reasons. In the first place, being a Florida state rate, it must be tested by Florida law. According to the common law which is of force in Florida except as changed by statute, a carrier's charges when not fixed by law or a contract are to be reasonable charges, to be judged by any court before which a controversy arises over them."

In determining whether or not the charges made and collected were proper charges, and if it is decided that they were not at the time lawful charges, in deciding what charges

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[fol. 469] the defendant may at the time have made and collected, the Master should be governed by what charges would have been proper under all the facts and circumstances, and according to the law and rules governing the fixing of rates and charges at the time they were made and collected. In deciding what should have been charged in the past, the facts now known to have existed at the time the charges were made should be taken into consideration.

There is a difference in looking backward and seeing and considering facts, known to have existed, and looking forward with expectation only as to what facts and circumstances will obtain during the period for which the charges or rates are made. In determining what charges should be made for past shipments, every element and factor that should be considered in making rates for future application should likewise be considered. The schedule of rates published and filed by Atlantic Coast Line for future application was charged and collected during the restitution period, but will be treated as if made at the time of each shipment and without any lawful authority from any court or rate-making body.

(a)

Unjust Discrimination:

In deciding what charges should have been made during a past period they should not be charges that would have caused unjust discrimination. Under the common law, there should be no unjust discrimination. Under section 30 of Article XVI, of the Constitution of the State of Florida and under the statute law of Florida, unjust discrimination in charges for transportation of persons and property by common carriers is condemned.

(b)

Just and Reasonable Charges:

The common law, Florida law and the Constitution of

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[fol. 470] Florida as shown in the first report of the Master, provide that rates shall be just and reasonable and this rule should have force and effect in determining what should

have been past charges in a proceeding of the kind in which this report is made.

(c)

Act of Congress:

The Act of Congress authorizing the I. C. C. to establish such intrastate rates as will not be an unjust discrimination against persons and localities or against interstate commerce, and as will bear an amount of revenue that will contribute a proportionate share towards maintaining an adequate national railway system, does not in and of itself provide that the rates established by State Commissions shall under any state of facts be unlawful, until they have been considered after a full hearing by the Interstate Commerce Commission and a finding made by it that they cause unjust discrimination against Interstate Commerce or otherwise violate the Act.

In the case of Board of Commissioners of North Dakota v. Great Northern Railway Company, 271 U. S., 412, 24 L. Ed. 936, a ruling to this effect was made by the Supreme Court of the United States. There are other authorities making the same ruling.

(d)

What Consideration Should the Master Give to the Act of Congress:

The provisions of the Act of Congress giving authority to the I. C. C. to change intrastate rates when they are found to be in contravention thereof should be considered by State Commissions and should have influence on them in establishing intrastate rates. This would likewise be true in determining what should have been charged during a specified period—a duty now imposed upon the Master in these proceedings. This is true in view of the findings of the Master, that in determining what such past charges

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[fol. 471] should have been he should be governed by the same rules and laws that would govern a State Commission in fixing rates for future application.

The Act of Congress provides a sound policy which should be followed in establishing rates or charges even

though the Act had never been passed, but after the Act of Congress has been passed defining what it conceives to be a proper policy and giving the Interstate Commerce Commission authority to carry it out, certainly the rate-making authorities should observe this policy in making intrastate rates. It would not be proper for such authorities to say that they will not observe what the Act of Congress says is the proper policy that should exist in determining what intrastate charges or rates should be but will fix and maintain, not in accord therewith, intrastate charges and rates and require shippers to pay only the amounts due thereunder until the I. C. C. goes to the expense and trouble of having a hearing and upsets them. It would likewise be improper for the Master, in deciding what should have been proper charges during a past period not to observe the policy set forth in the provisions of the Act of Congress.

The defendant in filing its schedules of rates that became effective during the period of restitution had a right at the time to expect that if any attack was made on the rates, the policy above referred to would be observed by the Court, though the charges involved in a case made by such attack would be past charges and therefore beyond the jurisdiction of the Interstate Commerce Commission to fix. It is not necessary that intrastate rates on shipment of logs or other commodities be the same as interstate rates to conform to the provisions of the Act of Congress. This is true when I. C. C. has hearings and makes findings under the Act.

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(e)

[fol. 472] Should Charges be Made During Period of Restitution for Trainload Shipments and for Less Than Trainload Shipments be Different:

In the order of re-reference the Court said:

"We recommit this matter to the Master with direction that he ascertain whether the charge made by the carrier for transportation in each instance was a reasonable one as measured by common law standard and if not, what was the reasonable charge to be made, and that he measure and award to each claimant restitution accordingly * * *."

Counsel for some of the claimants contend that the Master should find whether or not the charge made for each shipment was a proper and valid charge, and if not what charge should have been made respectively, on each shipment. While it is the duty of the Master to make these findings as to charges "in each instance" at the same time it was not intended by the Court in its order of reference that the Master should make findings of different charges for the shipments under consideration, if there was a violation of rules of law in so doing. If it is found that any overcharges were made and collected, it is necessary to find what they were "in each instance" instead of merely the aggregate amount for all shipments made respectively by claimants, because the charge made and collected would bear interest from the time made and collected "in each instance." But in fixing proper charges the Master should not under the facts and circumstances treat each shipment as if no other shipment was made during the period of restitution.

One of the rules governing the Master in determining what charges should have been during the period of restitution, is that there should be no unjust discrimination against other shippers. It being the established rule of the

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[fol. 473] Florida State Commission and the Interstate Commerce Commission—the two rate-making authorities having the right to make intrastate rates in Florida—that no difference in rates should exist for shipments of logs in single car loads and trainloads, or in any movement less than trainloads and above single car loads the Master feels it his duty to fix one charge applicable to all shipments, especially as all of these shipments were in the same territory. To estimate the charge for each shipment separately would involve, in some instances, the ascertainment of expense greater than in other instances because of delays not attributable to negligence of carrier, causing an increase of use of coal, extra compensation to trainmen and other expenses not ordinarily incurred, and because of number of cars hauled in many shipments varying in number.

The record shows that the cost of transporting logs was less when made in trainload shipments than in single car shipments and less when the shipments were less than

trainloads but substantially above single car loads and the Master feels it his duty to take into consideration these facts and determine, as best he can, what would be a proper charge applicable alike to all shipments, according to weight and distance.

One of the main reasons given by the State Commission, the Interstate Commerce Commission and decisions of some courts for condemning any rate above the single car unit is that to make a less charge for trainload shipments than for single car shipments would have a tendency to suppress shipments in single car loads by those unable to ship in greater quantities.

There are reasons why the shippers in single car loads should pay no more than shippers in greater quantities in one shipment. If the former had to do this they might not be able to compete with the latter having a less rate in the sale of lumber manufactured from the logs and being the owner of small acreage of timber, their timber might go to waste.

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[fol. 474] The intrastate rate in Florida for shipment of logs not more than six feet in length is less than for shipments involved in this proceeding of logs of greater length and the reasons given for this lower rate is that unless the rate was lower the short logs might go to waste, but if shipped could be used for making crates and the rates on what is called waste wood is lower for similar reason though the cost of transporting logs over six feet in length is about the same as transporting logs not over six feet in length or waste wood. The latter consist of stumps, roots and limbs of trees that have fallen in the woods. They are low grade commodities and the clearance of lands being of interest to farmers in developing agriculture, lower rates for their shipment are made.

In Aldredge on "Rate Making for Common Carriers," the author gives as one of the things to be considered in making rates "General public good, • • • good to the shipper, the carrier and the different localities affected." It might be to the general public good and also the good of different localities, if the owner of small acreage was encouraged to grow timber.

4

Status of Interstate Commerce Findings Before the Master

The first finding of the Interstate Commerce Commission in the case made by the filing of the petition of the Georgia Public Service Commission with the Interstate Commerce Commission was on August 2, 1928 (146 I. C. C. 717), wherein the latter undertook to fix interstate rates on shipment of logs from North Florida to destinations in Georgia up to 170 miles, and undertook to establish the same rate for intrastate shipment of logs in Florida for corresponding distances. These rates were to become effective February 8, 1929.

The interstate rate has never been disturbed. No attack

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[fol. 475] is now made on it and it has been in force since it was established, August 2, 1928.

After the findings of the Commission with reference to the intrastate rates was declared invalid by the Supreme Court, on a re-hearing by the Commission it established on July 5, 1932 (R. 186 I. C. C., 157) the same rate that was found in its order of August 2, 1928. The effective date of the order was postponed and the case re-opened for further testimony on motion of claimants because of a number of new rates having been established in other States in the Southern Territory, making the rates on the shipment of logs lower. Upon this re-hearing the I. C. C. on January 9, 1933, affirmed its previous finding. (190 I. C. C. 588).

In the case of Atchison, Topeka & Santa Fe Ry. Co. v. U. S., 284 U. S. page 248, the Court said:

"It is plain that a record which was closed in September, 1928—relating to rates of a major description of the traffic of the carriers in a vast territory cannot be regarded as representative of the conditions existing in 1931. That record pertains to a different economic era and furnishes no adequate criterion of present requirements."

Findings of the Commission on rates for future application under some authorities might not be admissible under certain conditions on a hearing when past charges for

a period existing prior to such finding are in question. (See Anniston Mfg. Co. v. So. Ry. Co. (Ala.), 40 So. 965; Lincoln Gas & Electric Co., 257 U. S. page 6, 66 L. Ed. 101).

The reports and findings of the Commission relate to rates above referred to and constitute a part of the record of this case, or at least a part of the record out of which it grew. The Commission has had much experience in rate-making. In its reports it discussed and criticized computations of some expert witnesses and stated computations and findings of its own. The Master thinks the reports should be considered in this investigation but nothing stated in them including its findings are binding on the Master in considering or deciding any of the questions or issues before him.

[fol. 476] 15

The oral and documentary evidence in the record before the Interstate Commerce Commission, in many instances, is substantially the same as the evidence introduced in the hearings before the Master and in this report the Master will frequently refer to statements in the reports of the Commission, where such evidence is succinctly stated and readily accessible, instead of making reference to the evidence introduced at hearings before him.

5

Some Facts of Importance to Be Considered in Determining Proper Charges

In Aldredge, "Rate Making for Common Carriers," he specifically points out twenty-two factors to be considered in making rates as being the most important factors, but they do not include every one that should be considered. If all of the facts that are important in determining what a proper charge should be during the period in question and the testimony in the record in regard to them were referred to and discussed, it would require much space. The Master will undertake to refer to and in a limited way discuss some of them.

There was introduced in evidence before the Master and the Interstate Commerce Commission evidence as to many rates. Rates for transporting the same commodity re-

mote in point of time when labor, material and other expenses incurred in transportation were lower than they were when past charges are to be fixed or rates are to be made, and rates in a different locality remote in distance where similar conditions do not prevail, are not of much value and some of them are of no value. It is true, however, that low rates on logs in one locality has effect on rates on shipment of logs in a distance locality where the manufactured product is reshipped from both localities to same destination. Many rates now existing are for good reasons lower than other rates for transportation of the same commodity in the same locality. Rates are made lower in some instances because of truck and water competition. Some are reduced because of being transit rates,

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[fol. 477] or because the carrier without the rate being named as transit rate frequently has the shipment of the outbound product given it by the shipper for various reasons. Some rates are low to encourage manufacturing industries and others because the product shipped would go to waste unless shipped under low rates.

(a)

Transit Rates:

There are many commodities that are not processed but consumed at destination and when there is to be a reshipment in different form carriers should be, and are, willing to ship the original product at a very reasonable rate, if they can get the reshipment. Referring to the rates established in 1932 which caused claimants to ask for a rehearing after the report of the Interstate Commerce Commission dated July 5, 1932, the Interstate Commerce Commission, in its report dated January 9, 1933, said in 190 I. C. C., page 592, the following:

"It is clear from the record that the object of the southern lines in establishing these per car rates was not merely to meet the truck competition on the logs, but was to be assured at the same time of receiving the outbound movement of the manufactured product; and that while these rates standing alone would not be attractive to these carriers from a revenue standpoint, they are attractive when

coupled with the rates for the outbound movement of the manufactured product. A representative of the Southern testified that in those instances in which its per car rates were not made dependent on the outbound movement of the manufactured product it was willing to depend upon what it termed the moral obligation of the shipper to give it the outbound movement."

Many transit rates were shown to be much lower than the local rates and there is testimony in the record that some of the carriers transport logs practically at cost and without any profit in order to get the shipment of the outbound product.

[fol. 478] 17

(b)

Rates on Cement, Lime, Brick, Sand, Etc. The defendant introduced in evidence rates charges for shipment of lime, cement, brick, sand, gravel, and other low grade products to show that they were much higher than the rates charged for shipment of logs during the restitution period. These rates may have been too high, but if not it was not shown that they were transit rates or that there was any product manufactured from the commodities that would or could be re-shipped. The evidence discloses that while the intrastate charges on logs in question during the restitution period were not made upon the condition that the lumber would be re-shipped over the carrier's lines, in fact much of the lumber manufactured from the logs shipped by claimants was reshipped by them over the carrier's lines and some of it was shipped long distances. Many of the shipments of logs were in trainload lots with but little terminal expense.

These facts alone should justify a lower charge on logs than on cement, lime, brick, and other low grade products.

(c)

The Percentage of System Log Traffic to Total System Traffic Was Much Greater Than Percentage of Revenue From Log Traffic to Total System Revenue:

In 186 I. C. C. 166 the Commission in its report dated July 5, 1932, gives a table wherein it is shown:

System:	1928	1929	1930
Total traffic, tons	20,402,922	18,951,802	16,784,331
Log traffic	1,422,874	949,840	667,612
Percentage of log traffic to total traffic	7.0	5.0	4.0
Total Revenue	$52,019,283	$53,188,639	$46,428,030
Log Revenue	$997,139	$794,334	$615,393
Percentage of log revenue to total revenue	1.9	1.5	1.3

[fol. 479] 18

Florida:	1928	1929	1930
Total Florida traffic, tons	8,622,556	8,547,924	7,660,058
Florida log traffic, tons	814,777	366,426	272,150
Percentage of Florida log traffic to total Florida traffic, per cent	9.4	4.3	3.6

The percentage of Florida log revenue to Florida total revenue was not given in the table.

Logs are a low grade commodity and are shipped in carload lots and often at transit rates and in trainload lots with but little terminal expense. The shipment of logs does not bear revenue as high in proportion to tonnage, as does the shipment of high grade products.

If the charges made for these high grade commodities were made the same for the shipment of logs there would be no shipment of logs. Carriers would have big losses if at the same rate per ton at which logs are shipped they had to carry fruits, vegetables, and men's and women's wearing apparel. If of the latter approximately three and one-half billion pounds had been shipped in 1928 and 1929 how many cars would have been required in these shipments? This number of pounds of logs were shipped in these two years. The shipper of logs could not stand the high rate of high grade commodities, and carriers could not stand on high grade commodities the low rate that they charge for the shipment of logs.

(d)

Decline in Log Shipments During Restitution Period:

There was considerably less decline from 1928 in the percentage of system log traffic to total system traffic in 1929 and 1930 during which years the increased rates were effective, than there was in Florida log traffic to total Florida traffic during these years.

[fol. 480] 19

	1928	1929	1930
The percentage of Florida log traffic to total Florida traffic in the years 1928 29-30 was as follows:	9.4	4.3	3.6
But the percentage of System log traffic to total System traffic in these years was only.....	7.0	5.0	4.0

The Florida intrastate log traffic in 1928 in number of cars was 27,119 and in tons was 814,777; in 1929, in cars 13,207 and in tons 336,426; and in 1930 in cars 9,376 and in tons 272,160. The total system log traffic in 1928 in cars was 51,801; in tons 1,422,874; in 1929 in cars 37,206 and in tons 949,840; and in 1930 in cars 25,738 and in tons 667,612.

There is no doubt but the decline in log traffic after the Cummer scale was increased was substantial and much of the decline was due to the increase of rates. A very small part of it was perhaps due to the depression. The depression did not likely affect the shipment of logs until some time about the latter part of 1930 near the end of the period. Some of it was due to shippers preferring to have their mills in the woods near the timber and cease the shipment of logs even though the Cummer scale had not been increased and some of it was due to the exhaustion of timber. In 186 I. C. C. 171 the I. C. C. says some of this decline was due to the increase of rates, which was effective from February 8, 1929, and through 1930.

The fact that there was no increase of shipments after April 10, 1931, when the Cummer scale was again put into effect was due to a considerable extent, at least, to the depression which at that time had become serious and was affecting the lumber industry and all lines of business. The I. C. C. several times stated in its reports that the depression began to affect the lumber industry mainly about the latter part of 1930.

[fol. 481] 20

The Florida log traffic is one of importance to the defendant from the standpoint of revenue. In 1928 the defendant transported 51,801 cars on the system of which 27,119 cars were in Florida. The Florida traffic was over 50% of the system traffic. In 1924 there was standing pine timber alone of 24,348 billion feet and in July, 1931, there were 21,913 billion feet (186 I. C. C., page 173).

While there were 64 mills on the lines of the Atlantic Coast Line in Georgia within 170 miles from Florida within which distance the rates were applicable for the shipment of logs, after the interstate rate and the intrastate rate were made the same and there was no discrimination, there has been no shipment of logs from Florida to Georgia. It is contended, however, that this was due mostly, if not entirely, to the fact that the mill owners in Florida owned nearly all of the timber from which the logs were shipped. The I. C. C. in its report of July 5, 1932, made no finding with reference to undue prejudice against persons and localities in interstate commerce.

(e)

Effect of Increase of Rates by I. C. C. August 2 on Mills and Investment of Shippers:

The amount paid by claimants to the Atlantic Coast Line under the charges made for the shipment of logs during the period of restitution, beginning February 8, 1929, and ending March 5, 1931, was $293,946.38 more than they would have paid if the Cummer scale had not been raised. Shippers contend that if any increase of rates should have been made, which they deny, the big increase that the shippers had to pay by reason of just one raise of rates was too great.

Counsel for claimants contend that large investments were made by shippers on the faith of the Cummer scale of rates, which had been in force for a good many years, being continued. They contend that by reason of making

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[fol. 482] an increase of rates on logs that was more than double the amount of the Cummer scale, the Brooks-Scanlon Corporation dismantled its plant at Eastport, whose population was reduced from about 5,000 to 50, and that a loss was incurred by them of over $3,000,000. Counsel for claimants also contend that there were other claimants who had losses by reason of this increase in rates, which caused them to move their mills to the woods.

Witnesses for defendant contend that some of these shippers expected to move their mills to the woods even if the Cummer scale had been continued, for the reason that it

was cheaper for them to have mills near the timber. Witnesses for the defendant further contended that the Atlantic Coast Line would realize almost as much, if not as much, from the shipment of lumber from mills near the timber, without any shipment of logs, as they would from the aggregate amount received for the shipment of logs and lumber manufactured therefrom.

With reference to what consideration should be given to any effect on the investments and business of claimants as a result of making the rates higher than the Cummer scale, this court in this case, to-wit, State of Florida v. United States (30 Fed., 2d Series, 116), on page 121 said:

"The serious effect of altering the rates upon the business of complainants and their investments made on the faith of them is strongly urged. Such things may be considered by the Commission in determining what is just and reasonable, or undue or unfair, without vitiating their finding (I. C. C. v. Union Pacific Railroad Co., 222 U. S. 541), and were considered in this case. But such considerations cannot be made the sole basis of a rate order (Southern Pacific Company v. Interstate Commerce Commission, 219 U. S. 433). A fortiori, they alone cannot avail in this court to overturn an unfavorable order."

[fol. 483] 22

(f)

What Movements in Florida Were in Trainloads:

There is no doubt but that shipments of 40 to 45 cars of logs every other day during the period of restitution from Hines to Palatka, by Wilson Cypress Company, were in trainload lots. These shipments constituted approximately half of all shipments during the period, and claimants contend there were other trainload movements. There were many other movements of logs exceeding single car movements to a great extent. Witnesses for defendant said that during the period the total number of cars shipped was 18,946 and that the number of cars shipped in trainloads was 10,078 and that the number of cars shipped that were not in train loads was 8,868. He states that the number of cars shipped in trainloads represents 53.2% of the total

movement and the number of cars in less than trainloads represents 46.8% of the total.

In 186 I. C. C. 188 it is said:

"The record shows that during the period of approximately two years following the increase in rates the total movement amounted to 18,602 cars. This total included 3,740 cars transported to Eastport, Lacoochee, and Otter Creek in trainload movements that have ceased and will not be resumed."

The period referred to was during the period of restitution and trainload movements above named are other than those from Hines to Palatka, which constituted about one-half of total movement.

In 190 I. C. C. 597 the I. C. C. in its report of January 9, 1933, said:

"Exclusive of the movement in trainloads, defendant handled a monthly average of 282 carloads of logs over 6 feet in length between points in Florida during the year 1930, an average of 198 carloads a month during 1931, and an average of 188 carloads a month during the first eight months of 1932."

[fol. 484] 23

All of the year 1930 and from its end to March 5, 1931 was in the period of restitution. During this period there were many logs shipped in trainloads, and many in less than trainloads and above carloads in trains conveying other freight. It would require much space to make statements in detail as to latter shipments which are before me.

6

HIGH COST OF TRANSPORTATION IN STATE OF FLORIDA

The record shows that south of a line from Jacksonville, over the Seaboard Airline Railroad to River Junction, a higher rate—in many instances 15%—is charged because of higher cost claimed by carriers to exist in transportation of freight. In 186 I. C. C. page 184, it is stated:

"In 1927 there were 894.54 miles of railroad in Florida north of that line that were operated for freight traffic, and

4,183.01 miles in Florida south of that line. The traffic density of the lines in Florida north of that line was 615,318 revenue ton-miles per mile of railroad as compared with 557,286 revenue ton-miles per mile of railroad south of that line. The less favorable operating conditions in Florida south of that line have given rise to the general practice of permitting the addition of arbitraries to the rates on interstate traffic to and from points in that territory. See Southern Class Rate Investigation, 100 I. C. C., 513, 585, 626, 646; 128 I. C. C., 567, 594, 602."

It is contended that the costs of transportation in Florida is higher than on balance of system and is attributable to a great extent, if not mainly, to low density of traffic. Density of traffic consists, not only of volume of business, but the length of the haul. It appears that about 25% of the Florida business is in shipments of vegetables and fruits,

[fol. 485] and a witness for the defendant said but for these shipments from Florida the Atlantic Coast Line "would be in a hard way to exist." The I. C. C. in criticising estimate of one of defendant's witnesses because based on division average in Florida said transportation of vegetables and fruits require speedy and costly service." Nearly all of the vegetables shipped by defendant from Florida are in interstate shipments. Not only are there long hauls in Florida and other states of this heavy movement originating in Florida of vegetables and fruits, but the record discloses that there were many interstate shipments of lumber, some of which were in long hauls.

Many of these shipments of vegetables and fruits are carried through Georgia, South Carolina, North Carolina and to Richmond where they are delivered to a connecting carrier. It is not proper in assigning revenue from such shipments or shipments delivered to A. C. L. at Richmond by a connecting carrier and from there carried by A. C. L. to Florida, to assign such revenue to Florida and all of the States through which said shipments are made on a mileage basis. Florida has terminal expenses in every one of such shipments originating or terminating in Florida and Georgia, South Carolina, North Carolina and Virginia have practically no terminal expense.

The expense of getting these shipments originating in Florida started on the main line in Florida for the trip in interstate commerce and the expense of delivering such shipments where carried to Florida should be considered. There are not only involved in these expenses what might be termed actual terminal expenses, but there are other expenses that should be taken into consideration.

These terminal and other expenses incurred for the benefit of the system involve compensation of trainmen, cost of coal and other expenses in assembling cars and in local

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[fol. 486] switching such as delivering the cars at proper places to be loaded by shipper at starting point, and expense at Jacksonville in many instances, of getting single cars in trains, making the interstate trip.

There is testimony in the record in regard to the fact that there are many branch lines in Florida. These branch lines likewise perform a service for the system in the interstate shipments referred to by bringing to the main line cars of vegetables, fruits, lumber, and other commodities and carrying from the main line interstate shipments to Florida to final destination at terminii, or local points on branch lines. In such instances, there is not only the terminal expense at the point of origin, or final destination, but expenses at places where the branch lines connect with the main line in shifting and switching cars. It does not appear to what extent these branch lines are dependent on interstate shipments of freight to and from the main lines.

In addition to considering expenses of trainmen there should be considered part of expense of some other employees rendering services at terminals and all other places where their services are needed to further interstate commerce. For purposes above stated there should also be considered part of expense of supervision, maintenance, Florida taxes, etc., especially as to terminals but not only as to terminals.

Contention has been made by witnesses that there is extra cost of transportation of nonrevenue or company freight to Florida because being a terminal state such freight has to be carried a greater distance than to other states. The

chief items involved in non-revenue freight are company coal and material, but the record shows that much, if not all, of the construction material transported goes to capital account and is credited to operating expenses. Even though it may cost more to transport company coal to Florida than to other states, it should be kept in mind that the actual expense to defendant of transporting coal, and

[fol. 487] other non-revenue freight could not be heavy when transported by defendant, because its shipment usually is in trains carrying revenue freight, and its transportation in this way does not increase expense of operating such trains to any very great extent. Only actual costs should be charged. A witness for defendant testified:

"The added ton that is put on a railroad is profit. It is like the added guest that comes to a hotel and occupies a room which would otherwise be empty. The cost of maintaining a track is first the irreducable minimum, and then every added ton you put on there of course tends to make you some profit. If you have enough traffic to pay for the cost of maintaining the property and you add one train on it, that train will not cause added maintenance cost to the same degree. I am speaking about maintenance costs only." (R. 722.)

Although he was only testifying about costs of maintenance his illustration as to "added guest" has some application to costs of transportation.

Some of this Company fuel is used at terminals, and a portion of the costs of transportation as well as costs of the coal constitute a part of the expense incurred for the benefit of the whole system in interstate shipments. The traffic density in revenue ton-miles per mile of road in Florida is less than revenue ton-miles per mile of road on defendant's system as a whole. Many of the interstate shipments from Florida swell the traffic density in Georgia, the Carolinas and Virginia. Such shipments not only increase the volume of business, but they take as long trip as possible to be made over Atlantic Coast Line Railroad in the States named. The fact that the density of traffic in revenue ton-miles per mile of road in all the states named is made high

[fol. 488] by Florida because of interstate shipments to and from Florida, and the density of traffic in Florida is made and called low by comparison, should be considered in dealing with the question as to the lower density of traffic in Florida. Florida does more for the system as a whole than any other State and it is to be inferred from testimony of one of defendant's witnesses that its system would die, but for being fed by Florida on its vegetables and fruits.

What has been said in this section of the report should be considered in connection with statements of witnesses to the effect stated below.

The out-of-pocket expense in Florida per gross ton-mile is much larger than the out-of-pocket expense per gross ton-mile on the rest of the system; Florida uses more coal per gross ton-mile than was used on other parts of the system and the traffic density of all lines of all railroads in south Florida per revenue ton-miles per mile is less than traffic density of all lines on all railroads in North Florida per revenue ton-miles per mile, or on system.

Florida being an originating and terminal state, necessarily involves an extra expense that is borne in various ways for things and to do things, from which in interstate commerce the rest of the system derives benefit.

While the difference in revenue ton-miles per mile in South Florida is lower than in North Florida, it does not clearly appear from the record that the traffic density in the immediate territory wherein most of the shipments of logs under investigation were made was lower, some of which shipments were made near the line from Jacksonville, by way of the Seaboard Airline Railroad to River Junction, though they might be in a locality or section or specified group of railroad lines of the country wherein traffic density was low.

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[fol. 489] 7

Estimates of Cost of Transporting Logs in Florida

In the computation of Mr. Lamb on the Hines to Palatka movement, during the month of November, 1930 he found the total handling expenses of this movement from Hines

to Palatka at $18.32 per car, and when to this amount was added $2.82 per car for Florida taxes, and $6.04 as representing a proportionate share of interest on investment at 5¾% the total would be $27.18 per car. The rate of 6.5¢ per 100 pounds paid during the restitution period applied to average weight of 64,000 pounds per car for the distance of 119 miles, results in a revenue of $41.60 per car. If the rate under the Cummer scale of 3.2¢ was applied, it would yield a revenue of $20.48 per car. The I. C. C. in its reports several times said that the cost in connection with the train-load movement from Hines to Palatka is lower than that in movements in single car loads.

In discussing estimates made by Mr. Lamb, one of the witnesses for defendant, the I. C. C. stated in 186 I. C. C., page 178:

"The weighted-average distance of the 18,602 carloads of logs transported by the defendant in Florida during the period from February 8, 1929 to January 31, 1931 was 81.36 miles, the average weight of the lading was 56,754 pounds, and the tare weight of the cars was 33,000 pounds, resulting in a gross weight of the loaded movement of 89,754 pounds. The testimony is to the effect that the log cars were returned empty almost without exception. Using 100 per cent as the proper figure for return empty movement, the gross weight of the loaded and empty movements was 122,754 pounds or 61.377 tons. The latter figure multiplied by 81.36 miles gives the gross ton-miles as 4,994. The unit cost of 0.462996 cent per gross ton-mile applied to 4,994 gross ton-miles results in a cost of $23.12 per car. This figure includes nothing for taxes or interest on in-

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[fol. 490] vestment. When $3.56 per car, as the proportion of taxes paid by defendant to the State of Florida, and $7.62 per car as the proportion of interest on investment of 5.75 per cent, are added, the cost becomes $34.30 per car.

The defendant did not present the figure $34.30 per car as representing the actual cost of the service, but stated that it was greater than the cost because it included certain expenses which were not attributable to the handling of logs. Defendant also presented another figure, $25.23 per car, based on the ratio of system out-of-pocket expenses

to total system freight operating expenses, after many deductions were made from the latter."

The I. C. C. said it was improper to use a system or division average in estimating the cost of transporting any commodity and could not accept computations of Mr. Lamb where he used the unit costs figure 0.0882888 as representing the average out-of-pocket expenses of handling all freight in the Third Division, which Florida mainly constitutes. It added that nearly 25% of the freight hauled in Florida consisted of fruits and vegetables, which require speedy and costly service.

After referring to the deductions which Mr. Lamb made of $9,629,744 in arriving at the figure $25.23 per car, the I. C. C., on page 179, says:

"This aggregate was deducted from the total freight operating expenses of $36,308,813 leaving the sum of $26,679,069 denominated the 'total haulage expenses.' The ratio of the total system out-of-pocket expenses, $6,920,684 to the total haulage expenses, $26,679,069 is 25.9405.

Use of this ratio results in a unit figure of 0.340351 cent per gross ton mile (0.0882888 cent, livided by 25.9405 multiplied by 100). This results in a haulage cost of $17 per car. When a proportionate amount is added for Florida property taxes $2.62 per car, the haulage cost plus taxes becomes $19.62 per car. A proportionate amount added to

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[fol. 491] that figure as representing interest on investment at 5.75 per cent, $5.61 per car, results in a final figure of $25.23 per car."

The average revenue per car of logs weighing 56,754 pounds for the average haul of 81.36 miles was $31.12.

The I. C. C. made a computation itself based on the average costs per unit for the Atlantic Coast Line system for the year 1929. It appears in Appendix E, in 186 I. C. C., pages 196 and 197. The Commission found the total operating expenses to be $17.07 per car for transporting logs in Florida for the calendar year, 1929, for an average distance of 81.36 miles, carrying a load of logs weighing 56,754 pounds.

With reference to this computation, the I. C. C. in 186 I. C. C., page 184 stated:

"From the foregoing it is apparent that the operating expenses allocated by defendant to Florida are not actual but constructive expenses, and that they are understated to an unknown extent. In view of this fact, system figures including Florida, which are not in question may be utilized as the basis for approximating the cost of transporting logs in that State.

Ordinarily it would be unsound to use a system unit cost to determine a cost in a particular state, but since it is indisputable that unit costs are higher in Florida than elsewhere on the system, it seems clear that system unit costs may be said to be less than the cost in Florida."

It would seem from the statements above quoted, that the justification for arriving at operating costs, based on a system average, was claimed to be that the unit costs are higher in Florida. But after making the above statement and stating its finding, the I. C. C., on page 187, said:

"The above figures undoubtedly understate the cost of

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[fol. 492] transporting logs in Florida for several reasons. One of these is that costs per unit in Florida are higher than the average for the entire road, or system, including Florida."

One of the main reasons why it is claimed that the cost of transportation of freight in South Florida is higher than on other portions of the system is that the density of traffic there is lower. The Master has already discussed the question of the density of traffic in Florida and the revenues from the Florida traffic and will not here again go into any details with reference to it.

Two other reasons were given why the figures named understate the cost; but the report is indefinite as to the extent the cost is understated for the two reasons given stated below.

It is said on page 187:

"Another reason why the computation on the basis of average cost per unit for the system understates the cost

of transporting logs in Florida is that these average costs per unit do not include anything for joint-facility and equipment rents."

No estimate is made as to the amount of these rents, or to what extent the figures found understate the cost, but it is simply stated they do because the "average costs per unit do not include anything" for these rents.

On page 187 it is stated:

"As heretofore indicated, the cost is also understated because it does not include the cost of transporting non-revenue or company freight."

It appears that there is no data in the record from which this cost can be ascertained, as the I. C. C. says, on page 186:

"Statistics kept by defendant, made no segregation of

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[fol. 493] the loaded car-miles and the gross ton-miles between revenue and non-revenue freight, and the record does not show the number of cars, and ton-miles of non-revenue freight. Due to this fact, it is not practicable to segregate the cost of transporting revenue freight, on the basis of including therein the cost of transporting non-revenue or company freight, so that the cost hereinafter developed are understated on this account."

The last two statements have the same meaning. The table in Appendix E of the I. C. C. shows "total loaded cars carried (revenue and non-revenue) 1,211,775." Where calculations to find costs of transporting logs, based on system average of transporting a car of all freight, including non-revenue or company freight are made, the supposed cost of transporting a car of logs found in such calculations includes part of costs of transporting coal and other non-revenue or company freight.

As stated in previous references to this feature of the matter, some at least of the company coal for use in Florida was embraced in terminal and other expense in interstate shipments, and the cost of transportation of this coal and other non-revenue freight could not be great as the ship-

ments were usually made in trains carrying revenue freight.

There are many matters to be taken into consideration when determining the cost of transporting logs in Florida, some of which have heretofore been discussed.

Some of the computations are based on the cost of single car movements, whereas, many of the shipments of logs in Florida under consideration were in trainload movements and many were in shipments between trainload

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[fol. 494] movements and single car movements. With reference to the Hines to Palatka movement, which alone constituted about half of the entire movement during the period, in 186 I. C. C., page 183, the Commission says:

"That movement, it must be remembered, was a regular one in trainload lots of 40 to 45 cars, and the cost of handling such solid trainloads direct between two given points without any intermediate train break-up classification yards and without any switching en route, is undoubtedly less than on single car-load movements which are handled in ordinary pick-up service."

One of the examiners of the I. C. C. recommended a charge on trainload movements from Hines to Palatka of one cent per hundred pounds lower than on other shipments.

While the rates charged during the restitution period were not named transit rates, in point of fact much, if not all, of the lumber manufactured from such logs, was reshipped over defendant's lines. In some of the computations no consideration was given to any shipment being made under transit rates.

The Master thinks it was erroneous to treat all cars returning empty as was done in some computations.

The volume of the traffic is another matter to be considered, and the volume of logs shipped was considerable. The defendant's lines cover a good portion of Florida, except in the southeast and there are over twenty billion feet of standing pine timber alone in Florida, which has a rapid re-growth. The scarcity of timber was urged by the defendant in an application to the Virginia Commission to install higher rates.

The car is the freight handling unit of the Railroad, and one of the important factors in fixing charges for ship-

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[fol. 495] ments is the size of the load. Log cars in the shipments under consideration carried a reasonably heavy load.

The charge made during the restitution period was more than twice that of the Cummer scale and was partly, at least, the cause of the heavy decline in shipments during the restitution period and induced no interstate shipments to Georgia, though the intrastate and interstate rates were made the same.

Increase of a charge of long standing by more than doubling it for shipments of logs to destination, where shippers had constructed large mills, plants, and homes for employees, must have inflicted losses in investments and business and this fact should be considered in determining what charge should be made during the period of restitution.

Part of costs of transporting a car of logs based on system average includes part of terminal expenses of transporting all freight in the system. There was only a small terminal expense in most of shipments of logs.

The cost per ton of transporting a commodity is an important item considered in fixing amount of revenue that should be derived from shipment. The revenue received from shipments is some indication of cost. The fact that percentage of system log traffic in tons in 1929 to total system traffic was 5.0% but percentage of log revenue to total revenue was only 1.5% might be of use in estimating the extent cost per car of logs in Florida is overstated in computations based on system average.

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What Should Have Been Charged for Shipment of Logs During Period

It appears from the record that the average distance of shipments of the 18,602 cars of logs hauled by defendant in Florida from February 8, 1929 to January 31, 1931, was 81.36 miles and the average weight of the lading was 56,754 pounds. Mr. Lamb, a witness for the defendant,

[fol. 496] found the costs per car to be $23.12; taxes $3.56 and 5¾% on investment $7.62, making a total of $34.30 per car. In view of what Mr. Lamb and the I. C. C. said, this estimate should not be given the same consideration as other estimates made. It will be observed that in other computations referred to below the difference between cost per car or costs per car with taxes and 5¾% added and revenue per car is a substantial amount.

Mr. Lamb, in another calculation, based on these averages in same period found per car $17.00 costs; $2.62 taxes, and $5.61 as 5¾% on investment, making total of $25.23. The average revenue received was $31.12 per car. The difference between costs with taxes and $5.61 as 5¾% on investment added and revenue is $5.89. Mr. Lamb says his cost figure per car understates the costs.

The I. C. C. made an estimate, based on same averages, and found per car costs $17.07; taxes $1.99 and 5¾% on investment $5.63, making total of $24.69. The difference between cost with taxes and $5.63 as 5¾% on investment added and revenue of $31.12 is $6.43. The I. C. C. says "The above figures undoubtedly understates the costs for several reasons" given. This calculation was based on system average. There is only a difference of seven cents between the total haulage costs in above finding of I. C. C. and last finding stated of Mr. Lamb.

In 186 I. C. C., 182, et seq., computations show during the month of November, 1930 for the trainload shipments in the Hines to Palatka movement, costs per car $18.51; taxes $2.85 and 5¾% on investment $6.10, making total $27.52. Revenue per car was $41.60. The difference between costs, with taxes and $6.10 as 5¾% on investment and revenue is $14.08 per car. The I. C. C. says that this finding is too low because in the Hines to Palatka movement hauling was made in trainload shipments, with but little terminal ex-

[fol. 497] pense. It is true that the charge the Master is to determine should not be estimated as if all shipments were in trainloads; but should be on basis that many were. Counsel for claimants in their brief say that under the cost per car appearing in above finding the return on investment

would be 18.86% and if the charges for transporting coal were omitted the return would be 24.15%.

In the record there are calculations of others which estimate the total haulage cost to be less than the estimates made by Mr. Lamb and the I. C. C., above referred to. Some were much less. If they were treated as correct, the return on investment from the revenue received would be shown to be very high. For instance, Mr. Saunders, a witness for claimants, in his computation of the Hines to Palatka movement, after eliminating charges for transporting company coal, found the cost per car $14.11, and after eliminating other out-of-pocket expenses, which he said should be eliminated, found the cost per car $12.11. After adding to the former $2.52 for taxes, and $4.65 for 5¾% on investment, his figure was $31.28, and after adding to the latter $2.11 for taxes and $3.99 for interest on investment, his figure was $18.21. The revenue per car was $41.60. Counsel for claimants in their brief say the return on investment per car in one instance would be 30.87% and in the other 39.44%. There were other estimates lower than those of Mr. Lamb and the I. C. C.

The net earnings of the system during the year 1929 were 4.2%; in 1930 2.37%; and 1931 1.57%. It would not be proper for a court in fixing charges for past shipments during a particular period in every instance to say a charge should be fixed that would only earn a net amount equal to the net amount earned by the system during that period, or that would only earn 5¾% on investment. It is important that intrastate rates should not be so low as to impose an undue burden upon the revenues of interstate commerce, but it is likewise important that intrastate rates should not be so high as to inflict upon intrastate commerce an undue burden. Neither the necessities of the carrier or shipper can be made the sole criterion for fixing rates.

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[fol. 498] What rate should be fixed, and what part of the income of the carrier should be paid by the shippers of logs is one to be determined under all the facts and circumstances.

The Master in his previous report on the first reference found the Cummer scale to be invalid because unjust and unreasonable and did not provide a proper return on in-

vestment, and the Master still feels that the Cummer scale is invalid for the reasons stated and so finds again, but he thinks that the charges made during the restitution period were too high.

The Master finds that the charges made by the Atlantic Coast Line Railroad Company for shipments by claimants of logs over the railroads of the Atlantic Coast Line Railroad Company in Florida, from February 8, 1929, to March 5, 1931, were not proper or lawful charges but were higher than proper or lawful charges and that the total principal amount that claimants should recover from the defendant, the Atlantic Coast Line Railroad Company, as and for overcharges on said shipments during said time shall be $99,941.77, which is 34% of the total or aggregate principal amount claimed by the claimants against the Atlantic Coast Line Railroad Company on account thereof during said period. The aggregate or total principal amount thus claimed by the claimants is $293.946.38 principal, and claimants shall recover as total principal amount from Atlantic Coast Line Railroad Company 34% of that sum besides interest on the same as hereinafter stated. Said $99,941.77 is an amount (34%) thirty-four per cent lower than the amount of the difference between the aggregate amount that would have been collected from February 8, 1929 to March 5, 1931, respectively, on each of said shipments under the Cummer scale and the aggregate amount actually collected under the charges made, respectively, on each of said shipments during said time.

The principal amount of overcharges, respectively, on each shipment shall be ascertained in a computation in which is to be made applicable, respectively, on each ship-

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[fol. 499] ment a proper increase of what was the Cummer scale that would have been applicable if said Cummer scale had been in effect at the time of each shipment. The amount of overcharge on each shipment made by claimants, respectively, resulting from above finding shall bear interest at the rate of 8% per annum from date of each shipment.

In the finding of August 2, the Interstate Commerce Commission was not convinced as to whether any movements of logs from Florida to Georgia would be made and they

were of necessity in doubt about other matters, such as what movement of logs would be made after rates were increased; what trainload movements would be and what effect increasing the rate would have no investments and plants of shippers. In fact, conditions were not the same that they were when the order of August 2, 1928, increasing the rates was passed. Statements were made in the reports that all shippers to whom the increased rate applied might ask for a change of it and a change would be made, if conditions made a change proper. In the subsequent reports of July 5, 1932, and January 9, 1933, rates were established for future application. Conditions were then different from what they were during period of restitution.

In some decisions heretofore cited it was held that in hearings to determine what should have been past charges during a specified period, findings of a Commission made subsequent thereto fixing a rate for future application are not even admissible.

The Master is to determine a charge that should have been made during a past period with knowledge of conditions that actually existed during such period.

I do not wish to be understood as criticising the I. C. C. or others in any way in this report. All of them acted concerning what rates should be for the future, according to their best judgment at the time after considering all

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[fol. 500] matters considered by them material.

The expert witnesses were men of much ability. Most of them made criticisms of the computations and reasoning of others and the I. C. C. found fault with its own examiner's report and criticised statements and findings of some of the expert witnesses and there is no impropriety in my freely discussing matters material to be considered. In fact, I think it my duty to do so as the matter under consideration is one of importance to parties interested, and I feel that in considering the question as to whether charges made were lawful and if found unlawful in deciding what the charges should have been, I should give my reasons for so doing that the Court might know and consider the grounds upon which my findings are made so that it would know better how to deal with them.

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[fol. 501] 9

Rulings on Objections to Testimony

Some of the testimony was according to strict rules not admissible, but its admission was not hurtful to party making objection because it was with reference to contents of documents or other things in the record already before the Court, or the testimony in substance was without objection before the Master in some other part of the record, or for other reasons not hurtful. Nearly all of the witnesses testifying were experts and a wider range was allowed than would have been if they had not been experts.

The Master sustains the following objections:

Objections appearing on page 170, et seq., of the record of counsel for defendant to the testimony of witness for claimants, with reference to contents of contract between the Savannah River Lumber Company and the Savannah & Atlanta Railroad Company.

Objections appearing on page 1169, et seq., of the record, of counsel for defendant to the testimony of Mr. Flack, witness for claimants, as to the contents of writings other than those introduced in evidence before the Master, and as to what others told him and all figures or data based thereon.

Objections (R. 1283) of counsel for defendant to testimony of witness Effinger for claimants as to what he was told about freight going out of the State from Florida.

All objections except those above referred to are overruled.

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[fol. 502] 10

Expenses and Fee of the Master

When the question of fixing the fees of the Master was before the Court after the first hearing, I understand that a fee of $5,000 for the Master for the hearings and report that was then before the Court was discussed. The compensation of the Master for both hearings was later fixed at $5,000. It could not then be seen how much time would

be consumed under second reference. It was probably not contemplated by the Court or anyone else when the order of re-reference was made for another hearing and report to determine only charges during period of restitution, that much work or time would be consumed because much evidence with reference to this question was introduced before the Master under order making first reference, and this evidence was by order of the Court to be considered before the Master in hearings on re-reference.

But the amount of time consumed and work done by the Master under the order of re-reference have been about three times as much as under the order making the first reference. The Master earnestly believes that he is justified in asking for extra compensation.

Under the first order of reference, there were four hearings consuming ten days at which testimony was taken, three of which were in Atlanta and one in Wilmington, North Carolina, and the time consumed in these hearings, studying record, making report, etc., was a month or more as stated in previous report. It was in fact more. The time of the Master consumed in connection with the performance of his duties under the order of re-reference has been three months, or more, making total time consumed about four months, or more than four months. Under the last order of reference the Master had to consider record in both references and in the last one there have been five hearings of testimony in Atlanta, and one in Jacksonville, Florida, consuming twelve days. Counsel made oral arguments before the Master beginning on Monday morning, August 14, at 10 o'clock A. M., and ending at 1 o'clock

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[fol. 503] the following Saturday. The hearings lasted every day until between 4:30 and 5:00 with about one hour or one and a quarter hours intermission for lunch, and after Monday generally began every morning between 9:00 and 9:15.

On the second reference, counsel have submitted briefs in the cases of a total of 750 typewritten pages and the report of the oral testimony taken at hearings before the Master cover 1305 typewritten pages on 8½" x 17" size paper. Testimony taken under first order covered 625 pages, making total of 2,680 pages of briefs and testimony besides — pages of briefs in first reference.

There were introduced in evidence several hundred exhibits. In addition to the record made before the Master on the second reference there was under the order before him the entire record before him on the first reference of 625 pages of oral testimony and many exhibits, and there was in addition placed before him for consideration the reports of the Interstate Commerce Commission in this case of August 2, 1928, July 5, 1932, and January 9, 1933.

In the performance of his duties in this case so much of the time of the Master was consumed that some of his other business was neglected, though he frequently worked more than the usual time during the day and often at night. His own stenographer, without expense to parties, did the work of writing the report and the original dictation had to be revised and the report written more than once before it was put in final form.

There were about thirty days consumed in hearing testimony under both references and oral argument on last reference. I do not recall time consumed in oral argument or number of pages of briefs under first reference. Much time was consumed in readying and studying briefs and record, making investigations, writing letters and writing reports in connection with work under both references.

If the compensation of stenographer, office rent, etc., paid

by the Master during the time he and his stenographer [fol. 504] worked in office during the four months referred to was considered, it would amount to a substantial sum. The Master had expense of telegrams, stamps, stationery and trips to Wilmington and Jacksonville. The Master feels that under the circumstances it would not be improper for him to ask for extra compensation, and contemplates doing so in a petition to the Court wherein he will ask the court to consider what he should be allowed for expenses, none of which have been paid, as well as extra compensation.

This 7th day of November, 1933.

Respectfully submitted, Horace M. Holden, Special Master.

[fol. 505] [File endorsement omitted.]

[fol. 506] [File endorsement omitted]

[fol. 507] INDEX

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[fol. 508] IN UNITED STATES DISTRICT COURT

No. 511, No. 512, No. 514

[Titles omitted]

EXCEPTIONS OF ATLANTIC COAST LINE RAILROAD COMPANY TO THE REPORT OF HONORABLE HORACE M. HOLDEN, SPECIAL MASTER, AS APPOINTED BY THIS COURT IN THE ABOVE STATED CAUSES—Filed Nov. 25, 1933

1

Now comes the Atlantic Coast Line Railroad Company, hereinafter referred to as the "Coast Line" and excepts to finding number 1 of the Master's report, entitled: "Election of Remedies", and each and all of the findings in said report, and assigns the same as error for that in the opinion

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[fol. 509] of the court dealing with the previous report of the Master, and in determining that there should be a re-reference, the court held:

"Assuredly in a court of equity those who seek relief must do equity and accord to others their just rights. We

therefore grant restitution, but not of the blind and instantaneous sort which settles nothing, but we condition it on a full inquiry which will do justice and give full and final relief to the parties."

In the order of reference the court directed:

"Under the special circumstances of this case we adjudge that the claimants of restitution should have the same only upon condition that they submit to an investigation of the true rights of the carrier to collect for the transportation of their logs during the period covered by the restitution, and submit to such an adjudication as will justly and finally settle the accounts between such claimants and the carrier. To this end we recommit this matter to the Master, with direction that he ascertain whether the charge made by the carrier for transportation in each instance was a reasonable one as measured by common law standard, and if not, what was the reasonable charge to be made, and that he measure and award to each claimant restitution accordingly."

At the opening of the first hearing before the Master on the re-reference (March 27, 1933), counsel for the claimants stated:

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[fol. 510] "If the court please, I would like to have the record show at the outset that we do not confess the errors of our way or the wisdom or propriety of the decision of the Master and of the court in the determination that the Cummer scale is not a just and lawful measure for restitution to be made us. We wish to save the point though we do now proceed and in proceeding insist that we are right and so proceeding does not cut off our rights in any court of appeal or otherwise to insist that the Cummer scale is the proper measure."

Counsel for the Coast Line then read to the Master the above quoted extract from the order of re-reference in this case and also the following quotation from this court's order of March 20, 1933 in this cause: (The order of re-reference is dated January 30, 1933).

"We have sustained our jurisdiction to make restitution for the period covered by our erroneous refusal to enjoin the attacked order, and this alone, under the equitable conditions which we imposed, is now before the Master."

Counsel for the Coast Line then called the attention of the Master to the fact that the position of counsel for the claimants did not comply with the requirements of either of these orders and that

"until compliance shall have been made by them they have no right to proceed in this re-hearing; that the proceeding proposed by them does not conform to the requirements of the court in either of the orders mentioned. The result is we object to the proceeding in this cause by the claimants."

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[fol. 511] The attention of the court was earnestly called to the fact that the claimants were not complying with the conditions upon which this cause was re-referred; that is, the claimants had not complied with the equitable conditions imposed by the court in ordering the re-reference.

The effect of the claimants' position was that they continued to claim that the measure of their claims for restitution was the difference between the Cummer scale of rates and the amount collected, which issue had been decided against them in the first hearing before the Master. They thereby continued to assert that the Coast Line was not entitled to show that the Cummer scale of rates was unjust and unreasonable or for any other reason unlawful, and they also continued to assert that the Cummer scale contained the only lawful rates for this traffic during the period involved. The re-reference was made upon the condition that the claimants should pay an equitable consideration therefor; that is, waive their claim that they were entitled to recover from the Coast Line on the basis that the Cummer scale of rates was the measure of their claims and that they were entitled to recover the difference between the Cummer scale and the scale actually collected by the Coast Line during the period involved.

5

[fol. 512] The court had held that in order to have equitable restitution the claimants should do equity by surrendering that claim.

The Master has held to the contrary. He has held that the claimants might proceed without making the surrender of that claim. The claimants elected to proceed without making surrender of that claim.

The Coast Line submits that the Master, for the reasons stated, was without jurisdiction to proceed in this cause. The procedure was inequitable. It allowed the claimants to proceed in an equity cause without doing the equity which the court had determined they should do. Claimants continued to make the said point; did nothing to waive the same and on final argument before the Master, orally and by brief, restated and earnestly insisted upon this position. (See record, pages 1-4, both inclusive.)

The Coast Line respectfully submits that this reference has not proceeded in the manner and on the conditions directed by the court; that the election was made by the claimants to hold to the claim that they were entitled to recover the difference between the Cummer scale of rates and the

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[fol. 513] amount collected by the Coast Line. That is, they elected to rely upon their construction of the case of Baltimore & Ohio Railroad Company v. United States, 279 U. S. 781. Having so elected and so having not complied with the conditions of the re-reference, the Master had no authority to proceed and the proceedings had before him was null and void.

1-a

The Coast Line excepts to said report for that the subject matter involved in this re-reference was without the jurisdiction of the court in that it required the ascertainment of what was a just and reasonable rate or rates applicable to each shipment on which the claims involved herein are based, and which rates did not make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or which did not subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and one which did not unjustly discriminate against interstate commerce; and

one which bore its fair proportionate share of the expenses of maintaining an adequate transportation system used in

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[fol. 514] rendering the service. Jurisdiction in the first instance as to this subjectmatter was with the Interstate Commerce Commission. It is respectfully submitted that the procedure before the Master on the order of re-reference has been without the jurisdiction of the court, and that all of the findings of the Master, therefore, are void.

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(a) The Coast Line further excepts to the second finding in said report, entitled: "Burden of Proof", for that the said report after stating that the burden was upon the claimants, and that:

"Should claimants carry this burden and make such show[illegible] the burden is also upon the claimants to further show what would have been just and reasonable charges before any recovery can be had."

The said finding should also have required that the claimants further show that these latter rates or charges would not 'make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or subject any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever', and also that those rates or charges would not work unjust discrimination against interstate commerce, as is required by the Act of the Congress known as the Interstate Commerce Act, and

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[fol. 515] especially as is required by sections 2, 3, 13 and 15a of said Act.

Failure to so find was error prejudicial to the Coast Line.

(b) The Coast Line further excepts to the following part of finding number two of the Master's report, to-wit:

"When there is no lawful established rate a Railroad Company can make such freight charges as it thinks proper

at the time of each shipment, or—which is the same thing—makes charges for shipments when made in accordance with a schedule previously filed and published, but if such charges are not lawful charges the shipper has the right upon proper proof to recover the difference between the amount collected from him and what would have been collected under just and reasonable charges, at the time."

Said finding of the Master should have also required that the amount collected from the shipper in the circumstances stated should be measured by what would have been collected under just and reasonable charges which would not "make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever," or which would not "subject any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever," and which would not have worked unjust discrimination against interstate commerce, as is required by the Act of Congress known as the Interstate Commerce Act, and required especially by sections 2, 3, 13 and 15a of said Act.

Failure to so find was error prejudicial to the Coast Line.

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[fol. 516] 3

The Coast Line excepts to the findings of the Master for that in the third paragraph entitled: "What law, or rules, are binding or of force in fixing charges for past shipments," the Master finds:

"In determining whether or not the charges made and collected were proper charges, and if it is decided that they were not at the time lawful charges, in deciding what charges the defendant may at the time have made and collected, the Master should be governed by what charges would have been proper under all the facts and circumstances, and according to the law and rules governing the fixing of rates and charges at the time they were made and collected. In deciding what should have been charged in the past, the facts now known to have existed at the time the charges were made should be taken into consideration."

Said finding is assigned as error for that:

(a) It is confusing and misleading;

(b) It is incapable of application;

(c) The rates charged by the Coast Line were made by lawful authority which is vested by law in the carrier when the rates made by public authority have failed;

(d) The said finding does not take into account the fact that an order to return part of a rate which has been charged involves the taking of moneys out of the treasury of the carrier in circumstances which prevent the distribution of the loss to its going business and the taking of such moneys works particular hardship against the carrier.

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[fol. 517] (e) The Coast Line excepts to the findings of the Master in subparagraph (c) of finding number 3, entitled: "Act of Congress," The Master there finds:

"The Act of Congress authorizing the I. C. C. to establish such intrastate rates as will not be an unjust discrimination against persons and localities or against interstate commerce, and as will bear an amount of revenue that will contribute a proportionate share towards maintaining an adequate national railway system, does not in and of itself provide that the rates established by State Commissions shall under any state of facts be unlawful, until they have been considered after a full hearing by the Interstate Commerce Commission and a finding made by it that they cause unjust discrimination against interstate commerce or otherwise violate the Act."

This finding is assigned as error for that it is in direct conflict with section 3 of the Interstate Commerce Act of the Congress and also in direct conflict with section 13, subparagraph 4 of said Act wherein the unjust discrimination against interstate commerce by an intrastate rate "is hereby forbidden and declared to be unlawful."

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[fol. 518] The Master cites Board of Commissioners of North Dakota v. Great Northern Railway Company, 281

U. S. 412. The Master has, we respectfully submit, wholly misapplied that case.

(f) The Coast Line excepts to the finding of the Master in subparagraph (d) of his finding number three under the heading: "What Consideration Should the Master Give to the Act of Congress"; and assigns the said rulings as error for that they are too indefinite; they do not state to what extent consideration should be given by State Commission to the "provisions of the Act of Congress giving authority to the I. C. C. to change intrastate rates when they are found to be in contravention thereof." This finding overlooks the fact that the provisions of The Interstate Commerce Act, sections 3 and 13 (4) in and of themselves make unlawful a rate applicable to intrastate commerce which gives an undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce. This finding is further assigned as error for that the Master

[fol. 519] holds that in determining what such past charges should have been he should be governed by the same rules and laws that would govern a State Commission in fixing rates for future application. The Master does not state what those rules and laws are and distinctly misinterprets the Interstate Commerce Act, as heretofore pointed out in the exception to the findings of subparagraph (c) of finding number three of his report. The Coast Line further objects to so much of the findings of the Master under subparagraph (d) of finding number three which holds as follows:

"It is not necessary that intrastate rates on shipment of logs or other commodities be the same as interstate rates to conform to the provisions of the Act of Congress. This is true when I. C. C. has hearings and makes findings under the Act."

This finding is assigned as error for that it is self-contradictory. Apparently it applies one rule as to the legality of a rate before the I. C. C. has acted and after the I. C. C. has acted, which is in conflict with the provisions of section

13 (4) of the Act, as hereinbefore stated. There is no finding as to the circumstances and conditions under which interstate and intrastate traffic moves.

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[fol. 520] The Interstate Commerce Commission found in its first report in this case, dated August 2, 1928 (146 I. C. C. 717, at pages 724-725) as follows:

"We further find that said undue preference and advantage, undue prejudice, and unjust discrimination can and should be removed by the establishment of rates for intrastate application within Florida which shall correspond with the rates herein found reasonable for interstate application from Florida to Georgia.

"We further find that whether the aforesaid rates pertain to transportation in interstate commerce or to transportation in intrastate commerce the transportation services in each instance are performed by defendant under substantially similar circumstances and conditions."

The Interstate Commission found in its second report in this case dated July 5, 1932 (186 I. C. C. 157, 189) as follows:

"We further find that the intrastate rates on logs over 6 feet in length, except walnut, cherry, and cedar, applicable between points on the Atlantic Coast Line in Florida for distances of 170 miles and less are, and for the future will be, unjustly discriminatory against interstate commerce, and that such unjust discrimination can be and should be removed by the establishment between all points on the Atlantic Coast Line in Florida for distances of 170 miles or less of rates *not less than* the rates shown for such distances in Appendix F hereto, which are the rates found reasonable for interstate application from northern Florida to Georgia." (Italics added.)

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[fol. 521] Those rates are the rates which were applied by the Atlantic Coast Line during the period involved in this case. The Master has failed to apply those rulings of the Interstate Commerce Commission, and without evidence to justify it, has held to the contrary.

Said finding is further assigned as error for that the question for determination by the Master was the rate to be applied in this particular case and whether the intrastate and interstate rate should be the same. The burden was on the claimants—they did not carry that burden. The finding of the Interstate Commission in this case was that the two rates should be the same. The Interstate Commission reaffirmed that finding in its third reported dated January 9, 1933 (190 I. C. C. 586, 600).

The claimants tried this case on the theory that the Interstate Commerce Act had nothing to do with these transactions. They did not undertake to carry the burden which was upon them of showing that the rates charged by the Atlantic Coast Line Railroad Company during the period involved, for the transportation of logs, and which

[fol. 522] rates were those which had been fixed before and subsequently by the Interstate Commerce Commission, were improper or unlawful when measured by the requirements of the Act of Congress known as the Interstate Commerce Act, and especially sections 3 and 13 thereof.

It is respectfully insisted that the Master should have found that the rates charged by the Atlantic Coast Line for the transportation of the logs during the period involved in intrastate commerce in Florida, were the minimum rates necessary to be charged in order to avoid unjust discrimination against interstate commerce.

(g) The Master finds:

"One of the rules governing the Master in determining what charges should have been during the period of restitution, is that there should be no unjust discrimination against other shippers."

The Coast Line excepts to this finding as being an insufficient statement of the law as to unjust discrimination. In order to prevent unjust discrimination the requirements of sections 3, 13 and 15a of the Act of Congress known as the Interstate Commerce Act should be compiled with and no rate should be exacted which makes or gives any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any par-

ticular description of traffic in any respect whatsoever; and also the rate should not impose any unreasonable burden against interstate commerce.

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[fol. 523] The Coast Line further excepts to the findings of said report for that the Master found in paragraph three (3) as follows:

"The intrastate rate in Florida for shipment of logs not more than six feet in length is less than for shipments involved in this proceeding of logs of greater length and the reasons given for this lower rate is that unless the rate was lower the short logs *might go to waste,* but if shipped could be used for making crates, and the rates on what is called waste wood is lower for similar reason though the cost of transporting logs over six feet in length is about the same as transporting logs not over six feet in length or waste wood."

Said statement is excepted to for that it does not correctly represent the evidence.

At record page 1030a of the hearing before the Master on the order of reference, the witness J. W. Perrin gave evidence on this subject. At page 1031 he testified that the rate prescribed by the Florida Commission on both long and short logs, other than cedar, was Class P rates for a car of 24,000 pounds. "In 1917 they prescribed Class P rates to 30,000 lbs." covering both short and long logs

"except in the meantime for the Seaboard Air Line R. R. and the Atlantic Coast Line R. R., they had prescribed certain other rates on short logs. So that when the Cummer scale became effective, in 1914, up to that time all rates on logs, both long and short, other than these rates per thou-

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[fol. 524] sand feet, the rates prescribed by the Florida Commission in Florida were the Class P rates per car per 24,000 lbs. In 1914 the Cummer scale made its appearance, and in 1915 the short length logs. Now mind you the Cummer scale applied only on the long logs, and in 1915 it was found that the short logs remained on this high level of Class P rates for 24,000 lbs., and it made the rates on the

short logs so much higher than on the long logs, that there was much complaint about it. There was complaint to the Florida Commission and complaints to both the Atlantic Coast Line and Seaboard Air Line. The Florida Commission first ruled that the Cummer scale on the Atlantic Coast Line would have to apply on short logs. However, the Atlantic Coast Line went into negotiations with the Florida Commission, and they finally prescribed on short logs Class P rates to 40,000 lbs. Now that means that having Class P rates to 24,000 lbs. as the prescribed rates on long logs, that they prescribed rates on short logs that were lower because they were the Class P rates applying for 40,000 lbs." (R. 1031-1032.)

This was arrived at by negotiation (R. 1032). After that the Interstate Commission raised the rates on long logs but did not deal with the rates on short logs and thus left the short logs on a lower rate than the long logs which Mr. Perrin states "was a very abnormal situation" (R. 1033). He further states:

"Now every scale of rates which the Interstate Commerce Commission had prescribed for the Atlantic Coast Line, say from North Carolina to South Carolina, and South Carolina to Savannah, had been made specifically to apply on short logs. This I. C. C. scale was originally established to apply on short logs, and in all other territories,

[fol. 525] on all other parts of our line, excepting Florida, and on all of these railroads in the South; and in all of these tariffs filed by the claimants, and which will be filed by me, the same rates apply on any kinds of log, whether long or short; and it is only this condition in Florida that has resulted in an abnormally lower rate on the short logs as compared with the long logs. As a matter of fact, the short logs are no more than long logs that are cut into convenient lengths for handling." (R. 1033-1034.)

The Coast Line further excepts to the findings of the Master in paragraph 3 of his report for that he finds:

"In Aldredge on 'Rate Making for Common Carriers', the author gives as one of the things to be considered in

making rates 'General public good, • • • good to the shipper, the carrier and the different localities affected.' ''

The Coast Line respectfully excepts to this for that the general public good or good to the shipper does not justify the requiring of a carrier to transport any class of freight at an unjust or unreasonable rate.

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[fol. 526]

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The Coast Line excepts to the fourth finding of the Master entitled "Status of Interstate Commerce Findings Before the Master" for that after detailing the first hearing and decision of the Interstate Commerce Commission (146 I. C. C. 717), the Master finds:

"After the findings of the Commission with reference to the intrastate rates was declared invalid by the Supreme Court, on a rehearing by the Commission, it established on July 5, 1932 the same rates that was found in its order of August 2, 1928. • • • Upon this rehearing the I. C. C. on January 9, 1933 affirmed its previous finding (190 I. C. C. 588)."

Said finding is assigned as error in that it does not state the full effect of the I. C. C.'s decision, for that the second finding and decision of the I. C. C. (186 I. C. C. 157) went further than a mere affirmance of the rates prescribed in the first instance and made in addition thereto those "basic and essential findings" which the Supreme Court held to be lacking in the first report and order; and these last, as well as all former findings, were affirmed in the third report and order of the Commission (190 I. C. C. 588).

Said finding is error in that the Master fails to state and to give effect to the full extent of the investigations and questions passed on and determined by the Interstate Commerce Commission; and his failure to so find was prejudicial to the Coast Line.

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[fol. 527] The Coast Line further excepts to the findings of the Master in his report for that while he held that "I am to consider any and everything in the reports of the I. C. C. and in the records before it, wherever the same

are pertinent"; and further, "It is proper for the Master to consider any and everything appearing in all of the records and reports wherever considered pertinent", he failed to give effect to the full and exhaustive investigation by the I. C. C. and the findings made by it in this subject-matter (146 I. C. C. 717; 186 I. C. C. 157; and 190 I. C. C. 588). The Master's findings ignore the paramount finding of the I. C. C.: that Florida intrastate rates less than those prescribed by it are, and for the future will be, unjustly discriminatory against interstate commerce and traffic moving thereunder will not carry its fair proportionate revenue burden. The Master throughout his report fails to consider that finding of the I. C. C. as pertinent although all of the claimants were either direct parties to the proceedings before the Interstate Commission or were represented therein by the Railroad Commissioners of Florida.

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[fol. 528] 5

The Coast Line excepts to each finding of the Master in his said report for that his findings and statements in the fifth paragraph of said report entitled: "Some facts of importance to be considered in determining proper charges", are erroneous, and for exceptions says:

Subparagraph (a), Entitled "Transit Rates"

The statements of the Master in reference to transit rates in this subparagraph of paragraph 5 are irrelevant and misleading.

The witness Perrin, in his exhibit 53b and in exhibit 54b, which is an analysis of 53b, showed comparisons of the "I. C. C. scale" with various transit scales of Southern lines. There were fourteen of these roads and the comparison shows that the I. C. C. scale, that is, the scale which was in effect over the Coast Line in Florida for the transportation of logs during the period involved, is practically the same, sometimes a little more and sometimes a little less than the average of those rates over the fourteen roads. The rate for 80 to 85 miles (the average haul of Florida logs, 81.36 miles) was 5½ cents in Florida against an average of those fourteen roads of 5.91 cents, and the highest rate amongst those fourteen roads for this distance was 7 cents. The rate for 110 to 120 miles (Hines to Palatka,

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[fol. 529] 119 miles) was 6½ cents in Florida against an average of those roads of 6.81 cents, and the highest rate amongst those roads for that distance was 8½ cents. Those roads had local rates which did not carry transit features (Perrin R. 1063). Those local rates are much higher than the I. C. C. scale (R. 1066).

Mr. Perrin testified (R. 1067):

"When we made our rates on logs we made them for transit purposes. You are correct in your idea that the bulk of logs we handle are for manufacture of lumber, but not necessarily that we get the lumber when it is manufactured, but they are made for the purpose of manufacture, and, therefore, *we put our local rates on the same level as the transit rates in the Mississippi Valley, such as shown in column 5* (referring to exhibit 54b). Now they carry these local rates much higher. May I mention another thing. We lose by that because we have at these several ports quite a large exportation of logs and the consequence is that instead of getting what ought to be paid, higher level for local rates to the port, where it is transhipped, we apply the I. C. C. scales which conform with the level of the transit rates of the lines which established transit rates. There is no transit feature connected with it for the logs are loaded on ship and carried into Europe for manufacture there."

It is thus apparent that the rates used by the Coast Line for the transportation of logs in Florida during the period involved were in effect transit rates or the same as transit rates.

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[fol. 530] Subparagraph (b), Entitled: "Rates on Cement, Lime, Brick, Sand, etc."

The Master refers to evidence showing that the rates for lime, cement, sand, etc., were much higher than the rates on logs. Those rates are shown by Perrin in his evidence at Record 1081-82, Exhibits 62b through 72b. The Master makes no finding and the claimants offered no evidence to show that the rates on those low grade commodities were not valuable as standards of comparison.

In 186 I. C. C. 165, the Commission finds that sand and gravel for instance has a value per ton of 35 cents to $1.35, while logs have a value of $2.80 per ton. The per mile car earning on a car of sand, at 120 miles, is 46.34 cents and on a car of logs is 30.59 cents. If the rates on sand, gravel, etc., were not valuable as comparison, the burden was on the claimants to show it, and this burden was not carried. The rates on sand and gravel were applicable in Florida and were approved by the Florida Commission and by the Interstate Commerce Commission. (See Exhibits 62b, 63b, 66b, 65b, 69b, 68b, 71b, 72b, and Perrin's evidence at Record 1081-82, et seq.)

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[fol. 531] Subparagraph (c), Entitled "The Percentage of System Log Traffic to Total System Traffic Was Much Greater Than the Percentage of Revenue From Log Traffic to Total System Revenue"

The findings as to the relation of the volume of log traffic to the revenue from log traffic, as stated in this subsection, are correct. The log traffic was 7% of all of the Coast Line's freight traffic in tons in 1928; the revenue was 1.9%; in 1929 that relation had dropped to 1.5%; and in 1930 to 1.3%. The balance of the Master's statements in this paragraph proceeded upon the theory that the rates used by the Coast Line during this period were not on the basis of transit rates, which is incorrect as we have already shown.

Subparagraph (d), Entitled "Decline in Log Shipments During Restitution Period"

The Master, after stating that there was a decline in the log traffic in the years 1929 and 1930 as compared with 1928, states that "a very small part of it was perhaps due to depression." There is no evidence to justify the statement that a small part of that decline was due to depression. Perrin testified that the year 1929 and subsequent years have been years of decreased activity in both the lumber business and the railroad business (R. 1070). The Interstate Commission found that much of the decline was due to the depression (186 I. C. C. at 171 and 188). The Master found that some of it was due to shippers preferring

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[fol. 532] to have their mills in the woods near the timber, which stopped the shipments of logs even though the Cummer scale had not been increased, and that some of it was due to exhaustion of timber.

The Interstate Commission found (186 I. C. C. 171) that:

"From what has been said above it is clear that the decline in Florida log movements can not be ascribed wholly to the rate advance. Part of the decline had not doubt been due to that cause but a large part had been due to change from mill location, uneconomical because too far from the timber, and cessation of movements because of exhaustion of the timber. The generally depressed condition throughout the country, in Florida, in the lumber industry generally and the Florida log industry has also had a marked influence upon the volume of the log movement in Florida."

The Commission also found at page 172 of 186 I. C. C. in substance, that there had been declines in other traffic and that the same forces operating to cause the decline in other traffic were also no doubt responsible for much of the decline in Florida log traffic.

Subparagraph (e), Entitled: "Effect of Increase of Rates by I. C. C. August 2nd on Mills and Investments of Shippers"

The statements of findings of this subparagraph are ex-

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[fol. 533] cepted to as irrelevant and immaterial to any of the issues involved. The issue involved concerns the lawfulness of certain charges by the Coast Line for the transportation of certain logs during a named period. This matter is disposed of by the decisions which have been made in this cause, one of which, to-wit: State of Florida v. United States, 30 Fed. (2d) 116, is cited in this report.

The following statement in said subparagraph is excepted to, to-wit:

"Witnesses for defendant contend that some of these shippers expected to move their mills to the woods even if the Cum-er scale had been continued"; etc.

This was not only the contention of the defendant's witnesses, but also the positive testimony of claimants themselves.

The witness Fleishel, President of the Putnam Lumber Company, testified in January, 1927, that he was moving his mill to the woods then and that the new mills in Florida were being built in the timber. This was restated by Mr. Fleishel in this cause (R. 279). The Commission refers to this condition in 146 I. C. C. 723, and dealt with it again in 186 I. C. C. at 169.

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[fol. 534] F. H. Wilson, General Manager of the Wilson Cypress Company, gave evidence to the same effect. (Page 586 of the Supreme Court record, cases Nos. 493, 494, 495, October Term, 1929.)

Mr. Foley, then Vice President and General Manager of the Brooks-Scanlon Corporation, gave the same kind of evidence at page 661 of the Supreme Court record.

The removal of the mills to the woods was made in response to an economic necessity. The railroads could not carry their logs except at an increase- rate. The advantage of being on tidewater was at an end.

Subparagraph (f), Entitled: "What Movements in Florida Were in Trainloads"

The statements of this subparagraph are excepted to for that they are indefinite. There was but one service in trainload movements of logs during this period, except for a few days immediately after February 8, 1929, and that was the movement from Hines to Palatka. And further, because it is improper and unlawful under the ruling of the I. C. C. and also the Florida Railroad Commission to make trainload rates. The scale of rates which was originally put into effect on logs in Florida (the Cummer Scale) was tendered to the Florida Commission as applicable only to trainload shipments and was rejected on that account. It was again tendered to apply on quantities of more than one car. It was finally accepted by the Florida Commission when it was made to apply to carloads as a unit. The rates which are applicable to carloads and which are applicable to trainloads are the same per unit, the unit being the car.

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[fol. 535] 6

The Coast Line excepts to each of the findings of the Master in his report under the paragraph numbered 6 for that the said findings are erroneous, and for exceptions says:

(a) The Master finds that density of traffic

"consists, not only of volume of business, but the length of the haul."

That finding is assigned as error of law and of fact for that the Master in applying it to ascertain density of traffic in Florida uses mileage out of Florida; and for that density of traffic consists of the number of ton-miles per mile of road; and in undertaking to find the density of traffic for a particular Division or a particular State, the length of the haul is to be considered within the Division or State and not out of the Division or State. Density of traffic for the System can not include the length of the haul beyond the System. Density of traffic for a Division or State can not take into consideration the haul out of the Division or State. There is no evidence to the contrary and a different application of the expression "density of traffic" would make an impossible use of the term, and would make it impossible to allocate the traffic of an interstate railroad to each of the several States or subdivisions in which it operates.

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[fol. 536] The quoted statement is further excepted to for that it is in conflict with the following finding of the Master in the same paragraph of his report, to-wit:

"The traffic density in revenue ton-miles per mile of road in Florida is less than revenue ton-miles per mile of railroad on defendant's system as a whole."

(b) The Master finds:

"Nearly all of the vegetables shipped by defendant from Florida are in interstate shipments. Not only are there long hauls in Florida and other states of this heavy movement originating in Florida of vegetables and fruits, but

the record disclosed that there were many interstate shipments of lumber, some of which were in long hauls."

The Coast Line excepts to said finding for that it is indefinite; and is wholly irrelevant to the determination of the density of traffic in Florida. Apparently it is thought that ton-miles made out of the State in the transportation of shipments originating in Florida, are, in some indefinite way, to be credited to Florida in ascertaining the density of traffic and expenses in Florida, which is erroneous. Except for the mileage out of Florida there would be no interstate traffic originating in or handled into Florida.

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[fol. 537] (c) The Master finds:

"Many of these shipments of vegetables and fruits are carried through Georgia, South Carolina, North Carolina and to Richmond where they are delivered to a connecting carrier. It is not proper in assigning revenue for such shipments or shipments delivered to A. C. L. at Richmond by a connecting carrier and from there carried by A. C. L. to Florida, to assign such revenue to Florida and all of the States through which said shipments are made on a mileage basis."

This statement of the Master is excepted to for that:

(1) It is entirely indefinite.

(2) The statement as to the method of distributing revenue on shipments carried out of or into the State of Florida is incorrect.

(3) The finding sets up no basis for the distribution of such revenue. It simply undertakes to strike down the mileage basis for the distribution of such revenue.

The burden of proof was on the claimants and the statement of the Master contributes nothing to the carrying of that burden.

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[fol. 538] (d) The Master finds:

"Florida has terminal expenses in every one of such shipments originating or terminating in Florida and

Georgia, South Carolina, North Carolina and Virginia have practically no terminal expenses."

He also finds:

"The expense of getting these shipments originating in Florida started on the main line in Florida for the trip in interstate commerce and the expense of delivering such shipments where carried to Florida should be considered. There are not only involved in these expenses what might be termed actual terminal expenses, but there are other expenses that should be taken into consideration."

Those statements of the Master are assigned as error, for that:

(1) They are exceedingly indefinite.

(2) They do not establish any basis for the distribution of any expenses.

(3) They show that the cost of handling the business in Florida is greater than the cost of handling business out of Florida and that a system operating ratio distribution of the expenses to Florida is fairer to Florida than the claimants have the right to require.

(4) The burden of proof was on the claimants and if there was absence of sufficient evidence to enable the Master to make definite determination of facts on which to base a finding overthrowing the rate structure applied by the Coast Line to the traffic in question during the period involved, the claimants have failed to carry this burden and the Master should have found for the defendant,

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[fol. 539] (e) The Master finds as follows:

"There are not only involved in these expenses what might be termed actual terminal expenses but there are other expenses that should be taken into consideration."

He also finds:

"These terminal and other expenses incurred for the benefit of the system involve compensation of trainmen, cost of coal, and other expenses in assembling cars, and in

local switching, such as delivering the cars at proper places to be loaded by shipper at starting point, and expense at Jacksonville in many instances, of getting single cars in trains, making the interstate trip."

These findings are excepted to for that:

(1) Each is too indefinite;

(2) Each shows that it is more expensive to do business in Florida than in other parts of the System.

(3) Terminal expenses should be properly charged to the State in which they are incurred.

(4) Neither shows any basis for distribution of the expenses;

(5) They burden of proof was on the claimants and these findings do not contribute anything to the carrying of that burden.

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[fol. 540] (f) The Master states:

"There is testimony in the record in regard to the fact that there are many branch lines in Florida. These branch lines likewise perform a service for the system in the interstate shipments referred to by bringing to the main line cars of vegetables, fruits, lumber, and other commodities and carrying from the main line interstate shipments to Florida to final destination at terminii, or local points on branch lines. In such instances, there is not only the terminal expense at the point of origin, or final destination, but expenses at places where the branch lines connect with the main line in shifting and switching cars. It does not appear to what extent these branch lines are dependent on interstate shipments of freight to and from the main lines."

Said statements of the Master are excepted to for that:

(1) They are speculative, indefinite and incapable of application;

(2) The burden of overcoming the rates charged by the Coast Line during the period involved was upon the claimants. This finding of the Master shows that the claimants

have not carried the burden as to any of the matters involved therein, for it shows "It does not appear to what extent these branch lines are dependent on interstate shipments of freight to and from the main lines."

(3) These findings are apparently made for the purpose of showing that the expenses in Florida should be attributed to Florida on some basis other than a system operating ratio basis which is much fairer to Florida than the conditions within that State justify.

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[fol. 541] (g) The Master finds:

"Contention has been made by witnesses that there is extra cost of transportation of non-revenue or company freight to Florida because being a terminal state such freight has to be carried a greater distance than to other states. The chief items involved in non-revenue freight are company coal and material, but the record shows that much, if not all, of the construction material transported goes to capital account and is credited to operating expenses. Even though it may cost more to transport company coal to Florida than to other states it should be kept in mind that the actual expense to defendant of transporting coal, and other non-revenue freight could not be heavy when transported by defendant, because its shipment usually is in trains carrying revenue freight, and its transportation in this way does not increase expense of operating such trains to any very great extent."

Said finding is excepted to for that:

(1) It is indefinite and wholly incapable of application;

(2) The burden is upon the claimants and that burden should have been exactly carried by them and the statements of this finding show it was not.

(3) Further because the Master proposes to treat expenses incurred for construction materials on a different basis because they go "to the capital account and are credited to operating expenses." That means he proposes

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[fol. 542] that the Company should earn less for transportation service which is to be paid for by having the

same charged to "capital account" than when that expense is paid for in cash, which is wholly erroneous.

(4) Further, because the Master finds that although it may cost more to transport coal to Florida, it is not to carry its due transportation charges because "its shipment usually is in trains carrying revenue freight and its transportation in this way does not increase expense of operating such trains to any very great extent. Only actual costs should be charged." That is an erroneous principle of law. Transportation of freight of any kind should bear its proportionate share of the expense of that service. Further, there is no finding by the Master as to what was the actual cost of this transportation.

Further, because the assignment of expenses to Florida is more favorable to this rate than the facts warrant. (Lamb's evidence, R. 320-21.)

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[fol. 543] (5) Said finding is further assigned as error for that the Master overlooks and fails to give effect to the evidence of the witness George W. Lamb at record pages 320-321 of the hearing before the Master held in May, 1932, where he testified in substance that the cost of transporting the coal in setting up the figures showing the operating earnings and expenses in his exhibit No. 2 for the year- 1922, 1926, 1927, 1928, 1929, 1930 and 1931, was not charged against the State of Florida; that is:

"Coal used on locomotives in Florida is purchased by the Atlantic Coast Line Railroad either from the Alabama fields or Virginia or West Virginia. Now, the coal is handled over the system all the way from these fields to the Florida state line by the balance of the Atlantic Coast Line system without any compensation. * * * The same is true of rail and other materials and supplies used in maintenance;" etc.

He further testified that:

"There is nothing originating in Florida for use on the balance of the system that would compensate this big service performed, for which we do not make any charges."

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[fol. 544] (h) The Master finds:

"Some of this company fuel is used at terminals, and a portion of the costs of transportation as well as costs of the coal constitute a part of the expense incurred for the benefit of the whole system in interstate shipments."

This finding is exeepted to by the Coast Line for that it is too indefinite to be applied. There is no finding that the fuel, the transportation of which was charged to the Third Division (Florida) was used out of the State of Florida.

(i) The Master finds:

"The traffic density in revenue ton miles per mile of road in Florida is less than revenue ton-miles per mile of road on defendant's system as a whole. Many of the interstate shipments from Florida swell the traffic density in Georgia, the Carolinas and Virginia. Such shipments not only increase the volume of business, but they take as long trip as possible to be made over Atlantic Coast Line Railroad in the States named. The fact that the density of traffic in revenue ton miles per mile of road in all the states named is made *high by Florida because of interstate shipments to and from Florida,* and the density of traffic in Florida is made and called *low by comparison,* should be considered in dealing with the question as to the lower density of traffic in Florida. Florida does more for the system as a whole than any other State and it is to be inferred from testimony of one of defendant's witnesses that its system would die, but for being fed by Florida on its vegetables and fruits."

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[fol. 545] The Coast Line excepts to said findings for that they are argumentative; irrelevant and too indefinite to be applied. The fact that shipments originating in Florida "swell the traffic density in Georgia, the Carolinas and Virginia" is irrelevant and immaterial to the ascertainment of the density of traffic in Florida or to the expense of doing business in Florida. The logs which moved during the period involved, the charges for thansportation of

which constitute the subject matter of this controversy, did not move out of the State of Florida and did not move in any other State.

Further, because the Master does not show or state to what extent or in what manner the matters and things mentioned in his said findings are to be taken into consideration, or to what extent or in what manner they are to be applied;

And further, because there is nothing in said statements or findings of the Master to contribute to the carrying of the burden placed by law upon the claimants.

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[fol. 546] (j) The Master finds:

"The out-of-pocket expense in Florida per gross ton mile is much larger than the out-of-pocket expense per gross ton-mile on the rest of the system; Florida uses more coal per gross ton-mile than was used on other parts of the system and the traffic density of all lines of all railroads in South Florida per revenue ton-mile per mile is less than traffic density of all lines on all railroads in North Florida per revenue ton-miles per mile, or on system."

"The Coast Line excepts to the Master's report for that the Master fails to give effect to the above finding in determining the charges during the period involved for the transportation of the logs which constitute the subject matter of this controversy.

Further, because the Master finds:

"Florida being an originating and terminal state, necessarily involves an extra expense that is borne in various ways for things and to do things, from which in interstate commerce the rest of system derives benefit."

The Master's report is excepted to for that while the Master recognizes that there are extra expenses in Florida, he misapplied that fact in reading his conclusions; and for that the above finding is too indefinite.

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[fol. 547] (k) The Master finds:

"While the difference in revenue ton-miles per mile in South Florida is lower than in North Florida, it does not

clearly appear from the record that the traffic density in the *immediate* territory wherein most of the shipments of logs under investigation were made was lower, some of which shipments were made near the line from Jacksonville, by way of the Seaboard Air Line Railroad to River Junction, though they might be in a locality or section or specified group of railroad lines of the country wherein traffic density was low."

The Coast Line excepts to said findings for that:

(1) They are irrelevant, ambiguous and confusing;

(2) They are not applied by the Master and are incapable if being applied. None of this traffic moved from a point in the territory in Florida north of the line of the Seaboard Air Line between River Junction and Jacksonville. The burden of showing what was the traffic density in the territory involved, was on the claimants and was not carried by them. If claimants are to have advantage from the claim that the traffic density in the territory through which this traffic moved was equal to, or greater than, the density of traffic north of the line referred to, it should have been shown by them in sufficient exactness to justify its application.

(3) The record shows that the traffic density in the immediate territory of these movements was very much lighter than either the system average or the average for the State of Florida. (R. 834.)

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[fol. 548] 7

The Coast Line excepts to the findings of the Master in paragraph 7 entitled "Estimates of Cost of Transporting Logs in Florida", and for exceptions says:

(a) The said findings are indefinite, argumentative and inconclusive. They are too indefinite to be made the basis of a judgment.

(b) They are not sufficient to contribute to the carrying of the burden of proof which was and is on the claimants.

(c) They are, for the most part, quotations of extracts from the decision of the Interstate Commerce Commission

in this cause reported in 186 I. C. C. beginning at page 157. The quoted extracts are disconnected and do not give a correct idea of the findings of the Interstate Commerce Commission.

(d) The Master refers to his previous finding to the effect that the density of traffic in Florida is to be ascertained by considering that part of the haul on traffic originating in Florida which is performed in other States, which is erroneous.

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[fol. 549] (e) The burden of proof was and is on the claimants, if it were necessary, to show the extent that the operating expenses allocated by the Coast Line to Florida were understated in the I. C. C. report (186 I. C. C. 184) and which is quoted in the seventh finding. This is likewise true of the finding of the Commission as to the understating of the unite costs because they do not include anything for joint-facility and equipment rents (186 I. C. C. 187), which is quoted by the Master in his seventh finding. This is likewise true as to the finding of the Commission as to the cost per unit understating the cost of this traffic because they did not include the cost of transporting nonrevenue or company freight. (186 I. C. C. 187.)

(f) The Master erred in finding that:

"Where calculations to find costs of transporting logs, based on system average of transporting a car of all freight, including nonrevenue or company freight are made the supposed cost of transporting a car of logs found in such calculations includes part of cost of transporting coal and other nonrevenue or company freight."

(g) The Master erred in finding that:

"As stated in previous references to this feature of the matter, some at least of the company coal for use in Florida was embraced in terminal and other expense in interstate shipments, and the cost of transportation of this coal and other nonerevenue freight could not be great as the shipments were usually made in trains carrying revenue freight."

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[fol. 550] Said statements are indefinite; they are also erroneous; they also state an improper method of ascertaining the cost of transporting nonrevenue freight which is equivalent to saying that the nonrevenue freight should be charged less than its proportionate part of the cost of carrying it.

(h) The Master states:

"There are many matters to be taken into consideration when determining the cost of transporting logs in Florida, some of which have heretofore been discussed."

This is excepted to as being too indefinite and indicates that there were matters taken into consideration which are not disclosed in the report.

(i) The Coast Line further excepts to the following finding of the Master in paragraph 7 of his report:

"Some of the computations are based on the cost of single car movements, whereas, many of the shipments of logs in Florida under consideration were in trainload movements and many were in shipments between trainload movements and single-car movements."

In this statement the Master does not take into consideration the fact that the rates which were charged were fixed by the Interstate Commerce Commission with knowledge of the facts which he mentions, in its original report and its two subsequent reports, which are not given adequate effect by the Master.

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[fol. 551] (j) The Coast Line further excepts to the following findings of the Master in paragraph 7 of his report:

"While the rates charged during the restitution period were not named transit rates, in point of fact, much if not all, of the lumber manufactured from such logs, was reshipped over defendant's lines. In some of the computations no consideration was given to any shipment being made under transit rates."

This finding is too indefinite; and for that the Master overlooked the fact that the rates which were charged by the Atlantic Coast Line Railroad Company during the period involved for the transportation of the logs involved, were as low as the transit rates which were in use by the other railroads in the Southern part of the United States which carried ninety-four per cent of all the logs carried in the Southern territory during the period under inquiry, and were very much lower than the local rates on those roads, and were the same or practically the same as the rates prescribed by the Interstate Commerce Commission in its orders entered in the following cases:

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[fol. 552] Southern Cotton Oil Company v. Atlantic Coast Line Rd. Co., 120 I. C. C. 190, on logs to Savannah, Ga., from A. C. L. R. R. stations in South Carolina, decided December 29, 1926;

Gulf Trading Company, Inc., et al. v. Alabama & North Western Rd. Co. et al., 146 I. C. C. 317, on logs from points in Alabama, Florida, and Mississippi to Mobile, Ala., decided July 6, 1928;

Rapp Lumber Company v. Louisville & Nashville Rd. Co., 159 I. C. C. 749, on logs to Barboursville, Ky., from points in Georgia, Kentucky, Tennessee, and Virginia, decided December 10, 1929;

South Georgia Traffic Bureau, for Beechwood Band Mill Co., v. Seaboard Air Line Rwy. Co. et al., 168 I. C. C. 83, on logs to Coredele, Ga., from points in Alabama, decided September 30, 1930;

Hudson Veneer Company v. Southern Railway Co. et al., 172 I. C. C. 589, on logs to Lenoir, N. C., from Southern Railway stations in South Carolina, decided February 20, 1931;

Groom-Rogers Timber Company, Inc. et al. v. Alabama & Northwestern Rd. Co. et al., 174 I. C. C. 715, on logs to Mobile, Ala., for export, from points in Alabama, Florida, and Mississippi, decided June 2, 1931;

Farris Hardwood Lumber Co. et al. v. Louisville & Nashville Rd. Co. et al., 178 I. C. C. 671, on logs to Nashville and other Tennessee points from points in Southern Territory, decided October 8, 1931;

A. K. Foss v. N. C. & St. L. Rwy., 186 I. C. C. 270, on logs to Chattanooga, Tenn., from Forest Mills and Summitville, Tenn., decided July 21, 1932.

(See exhibits of defendant Nos. 43b, 44b, 48b, 49b, 51b, 52b, 54b, 55b, 57b and 60b, and the evidence of J. W. Perrin, beginning at record page 1039 and running through page 1081);

and

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[fol. 553] For that the Master overlooked and failed to give effect to the evidence of J. W. Perrin (R. 1067) as follows:

"I said this, that when we made our rates on logs, we made them for transit purposes. You are correct in your idea that the bulk of logs we handle are for manufacture of lumber but not necessarily that we get the lumber when it is manufactured, but they are made for the purpose of manufacture, and, therefore, we put our local rates on the same level as the transit rates in the Mississippi Valley, such as shown in column 5 (he refers to column 5 of his exhibit 54b), meaning that they are transit rates. Now they (by 'they' the witness means the roads referred to in his exhibit 54b, other than the Atlantic Coast Line) carry their local rates much higher. May I mention another thing? We lose by that, because we have at these several ports quite a large exportation of logs, and the consequence is that instead of getting what ought to be paid—a higher level for local rates to the port, where it is transshipped, we apply these I. C. C. scales which conform with the level of the transit rate of the Lines that establish transit rates. There is no transit feature connected with it, for the logs are loaded on ship and carried to Europe for manufacture there."

(k) The Coast Line further excepts to the following finding of the Master in Paragraph 7 of his report:

"The Master thinks it was erroneous to treat all cars returning empty as was done in some computations";

for that this statement is too indefinite; and for that it ignores the testimony of the witness Lamb at record 827, as follows:

"Q. There is some testimony that some of these cars went back with some freight?

"A. Well, it was an infinitesimal amount. As I recall Mr. Saunders testimony, it was 98 to 100 per cent. It would be substantially 100 per cent. It is rare that any of these cars are ever utilized for any return freight."

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[fol. 554] (1) The Coast Line further excepts to the following finding of the Master in paragraph 7 of his report:

"The volume of the traffic is another matter to be considered, and the volume of logs shipped was considerable. The defendant's lines cover a good portion of Florida, except in the southeast and there are over 20 billion feet of standing pine timber alone in Florida, which has a rapid regrowth. The scarcity of timber was urged by the defendant in an application to the Virginia Commission to install higher rates;"

and for exceptions thereto says:

(1) The finding is too indefinite;

(2) So far as it relates to defendant's application to the Virginia Commission it is erroneous;

(3) Further because the volume of timber in Florida was known to the Interstate Commerce Commission at the time it made its findings in this cause as reported in 146 I. C. C. 717, and when it made its findings in its report as set out in 186 I. C. C. 157, and when it made its report as set out in 190 I. C. C. 588; and the Commission's findings were made with relation to said volume and rates were fixed on account thereof.

(m) The Coast Line further excepts to the following finding of the Master in paragraph 7 of his report:

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[fol. 555] "The charge made during the restitution period was more than twice that of the Cummer Scale and was partly, at least, the cause of the heavy decline in shipments during the restitution period and induced no interstate

shipments to Georgia, though the intrastate and interstate rates were made the same";

for that:

(1) This finding is irrelevant to the issue involved;

(2) It is too indefinite;

(3) The shippers never at any time had the right to an unreasonable or confiscatory rate;

(4) This finding does not take into consideration the fact that a great percentage of the timber in north Florida which might have been turned into logs and shipped from north Florida into Georgia was owned by the claimants; nor does it take into consideration the depression in the lumber and other industries which are referred to in the report.

(n) The Coast Line further excepts to the following finding of the Master in paragraph 7 of his report:

"Increase of a charge of long standing by more than doubling it for shipments of logs to destination, where shippers had constructed large mills, plants, and homes for employees, must have inflicted losses in investments and business and this fact should be considered in determining what charge should be made during the period of restitution;"

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[fol. 556] and for exceptions thereto says:

The Master has found that the rates charged known as the Cummer scale were unreasonable, unjust and confiscatory and this court has confirmed that finding. In his report the Master has found, in effect, that the Cummer scale should be increased sixty-six per cent. There is no finding by the Master that the increase of sixty-six per cent would not have had the same effect as an increase of one hundred per cent. The shippers have no right to have their product carried at an unjust, unreasonable or confiscatory rate. This finding of the Master is irrelevant to the issue involved.

(o) The Coast Line further excepts to the following finding of the Master in paragraph 7 of his report:

"Part of costs of transporting a car of logs based on system average includes part of terminal expenses of transporting all freight in the system. There was only a small terminal expense in most of the shipments of logs";

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[fol. 557] for that:

(1) said Finding is indefinite;

(2) It does not present any facts which can be taken into consideration in determining the issue involved in this cause.

(3) The Interstate Commission made its findings in this cause with ample knowledge and consideration of the terminal expenses.

(4) The log traffic should have borne its fair share of transportation costs; and before applying the System average the Interstate Commission found that it was advantageous to Florida because of the lack of density of traffic in the State of Florida, and the extra cost of doing business in Florida as compared with the average costs over the Syste-; and further

(5) Because said finding proceeds upon the assumption that the cost of transporting logs in Florida has been overstated, which is incorrect. Those costs were understated. (Lamb's evidence, R. 342, 343, 362, 363.)

In Lamb's ascertainment of cost as shown in column A of his exhibits 7 through 22, he eliminated all yard expenses (R. 388) and the Interstate Commission held that he had eliminated too much. (186 I. C. C. 179.) This was in addition to the ten per cent of advantage to Florida referred to in the foregoing record citations. (R. 342, 343.)

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[fol. 558] (p) The Coast Line further excepts to the following finding in paragraph 7 of the Master's report:

"The cost per ton of transporting a commodity is an important item considered in fixing amount of revenue that

should be derived from shipment. The revenue received from shipments is some indication of cost. The fact that percentage of system log traffic in tons in 1929 to total system traffic was 5.0% but percentage of log revenue to total revenue was only 1.5% might be of use in estimating the extent cost per car of logs in Florida is overstated in computations based on system average."

Said statement is too indefinite. It does not state to what extent the facts referred to might be of use in establishing the extent of the cost per car of logs is overstated; and the normal effect of the relation between the volume of traffic and the revenue derived therefrom would produce exactly the opposite conclusion from that drawn by the Master.

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[fol. 559]

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The Coast Line excepts to the findings of the Master in paragraph 8 of his report entitled: "What Should Have Been Charged for shipment of logs during period;" for that

(a) The said findings are contrary to law;

(b) They are contrary to the evidence and are without evidence to support them;

(c) The evidence of the claimants' witness, Saunders, which evidence was relied upon by the claimants' witness, Saunders, which evidence was relied upon by the claimants to establish the cost of the transportation movements is incorrect in the following particulars: (Saunders' evidence begins at R. 441, 2nd order of reference; Lamb's evidence dealing with Saunders' exhibits begins at R. 810).

(1) His ascertainment of the cost does not purport to state the entire cost of any transportation movement described by him (R. 520, R. 490, R. 837, Exhibit 80a).

(2) It is based upon an erroneous statement of what he calls "line-haulage" expenses (see exhibit 80a and R. 490; Lamb's evidence R. 837, et seq.). Line-haulage expenses are only a part of the costs which should have been charged against the transportation.

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[fol. 560] (3) It is based upon a disregard of the requirements of the Act of Congress known as the Interstate Commerce Act, especially sections 2, 3, 13, and 15a of said Act.

(4) It disregards discrimination against persons, places and particular classes of traffic which is made unlawful by sections 3 and 13(4) of said Act.

(5) It disregards the requirement of said sections of said Interstate Commerce Act which makes discrimination against interstate commerce unlawful.

(6) It disregards the provisions of the said Act to Regulate Commerce (§§ 3, 15, 15a) and the decisions of the United States Supreme Court which require that a rate shall be sufficient to carry its fair proportionate share of operating and maintaining the transportation system.

(7) It disregards the fact that traffic density in Florida over the lines of the Atlantic Coast Line Railroad Company is not equal to the traffic density of the System lines of the Coast Line, including or excluding the State of Florida.

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[fol. 561] (8) It overlooks the fact that it costs more to perform a unit of transportation freight service in Florida over the lines of the Atlantic Coast Line Railroad Company than over other parts of the Coast Line's system.

(9) It does not apply the laws of Florida which prevent unjust discrimination.

(10) The Cost of transportation is not the measure of a reasonable rate.

Exhibit 70a

The witness Saunders began his testimony with his exhibit 70a (R. 454; Lamb's evidence R. 810), and founded his evidence on the basis of showing that the "out-of-pocket" expenses for the Third Division of the Coast Line, which then included all the lines of the Coast Line in Florida except 126 miles, as stated by Lamb in his exhibit 23 (first order of reference) were erroneous. Lamb's original tes-

timony on this subject begins at record page 326 of the transcript of the testimony taken in May, 1932; see also R. 340, 342, 343. His exhibit 23 before the Master was the same as his exhibit 133 before the Interstate Commerce Commission.

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[fol. 562] "Out-of-pocket" expenses are those which are clearly ascertainable as being applicable to a particular train movement. Exhibit 23 dealt with the train movement from Hines to Palatka for the month of November, 1930. Lamb's ascertainment for the "out-of-pocket" expenses for this movement for that month was $2,398.55.

The first item in the out-of-pocket expenses was account 392—"Train Enginemen"—which Lamb stated at $506.19. Saunders' exhibit 70a undertakes to state this under the heading: "As corrected by adjustment" at $344.80. Saunders thus understates the cost of this item and he states the basis of his adjustment to be "Reduced on basis of average rates for 25 trips, *8 hours* per day." Saunders' statement of this account does not represent the moneys actually expended by the Coast Line as ascertained by Lamb in his exhibit. Lamb's figures were taken from actual records of the Coast Line. The movement from Hines to Palatka was 119 miles and the rate of pay for enginemen under the controlling contract was "equal in time by the clock to 9 hours and 31 minutes." (R. 764.) There was no contradiction of this. Account 392 is understated by Saunders by $161.39 or 31.88%. This item and the ones following it in this exhibit became a basis for ascertaining

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[fol. 563] a relation and small amounts of difference bring very great changes in the results.

Saunders next took Mr. Lamb's statement of account 394—"Fuel for Train Locomotives"—at $1138.49 and reduced it to $698.55. He stated that this item was "reduced to $856.32 on basis of actual cost and further reduced on basis of average tons per gross ton-mile at cost." The amount of fuel which was ascertained and used by Mr. Lamb in his statement of this item was the actual volume of coal delivered to the engines for this purpose. (See evidence of C. J. Oldenbuttel, R. 535; P. S. Smith, R. 545; and

H. H. Merritt, R. 562—May, 1932, hearing.) Mr. Oldenbuttel testified at record page 537 that the total amount paid out by the Coast Line during the month of November, 1930 on the Third Division under account 394, including freight to the Florida State line was $1,138.49. He means by that, that was the amount paid by the Coast Line during the month of November, 1930 for the fuel on the Hines to Palatka movement. This included no charge from the Florida State line to the place where the coal was delivered to the engines. The freight rate from the point where the foreign line delivered the coal to the Florida line was charged by

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[fol. 564] Lamb in his statement of "out-of-pocket" expenses (exhibit 23) at the rate of 5 mills per ton mile (R. 539, May, 1932, hearing). The quantity of coal was not ascertained by Mr. Lamb by estimate or calculation but by "actualities" (R. 540, May 1932 hearing). The coal was charged for "on the actual contracts for the coal at the time this car was being delivered at Palatka during this particular month" (R. 540, May, 1932, hearing.) The witness P. S. Smith (R. 545, May, 1932, hearing) produced the fuel and labor cards and the time tickets and vouchers before the Master for the month of November, 1930 covering the coal in question and testified to the delivery of the coal to the engines. The witness H. H. Merritt (R. 562, May, 1932, hearing) was the fuel agent of the Coast Line. He produced the original contracts with the mines covering this coal, showing the price of it. The fuel came from West Virginia, and was mined at Moss and Dante. Mr. Lamb at R. 811 (2nd order of reference) states:

"Mr. Saunders has disregarded the actual tonnage issued to these particular trains and has reduced the cost of fuel for train locomotives on the basis of average tons per gross ton mile for the system which is entirely wrong and purely arbitrary."

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[fol. 565] Mr. Lamb stated that the 5 mills per ton mile were applied to that service because

"We are endeavoring to determine the cost from Hines to Palatka, and therefore, it was entirely proper to include that." (R. 812.)

The 5 mills per ton mile amounted to $282.17 for the Hines to Palatka movement and that amount is included in Lamb's figure of $1,138.49 for account 394. Saunders understates Lamb's figure for this item by $439.94 which is 38.64%.

The next account with which Mr. Saunders deals in his exhibit 70a is account 402—"Trainmen" which Mr. Lamb states at $562.86 and Saunders at $427. There is no controversy but that the $562.86 was actually paid for this service on this account. Saunders' figure was ascertained on the basis of 25 trips, 8 hours per day. As we have seen under the controlling contract then in force the time for which payments were made was not 8 hours, but 9 hours and 31 minutes. Saunders was clearly in error as to the account 402.

Beyond any doubt Saunders' exhibit 70a is erroneous. It became the basis of all his other calculations. The errors in exhibit 70a follow his exhibits throughout and make them all worthless.

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[fol. 566] Exhibit 71a (R. 461; Lamb's Evidence, R. 815)

Saunders then proceeds with his exhibit 71a which is stated by him in two forms: one is based upon Lamb's statement of the out-of-pocket expenses at $2,398.55 "corrected for wage and fuel adjustments" which reduces those out-of-pocket expenses to $1,661.36; and the other is based on Lamb's statement of those expenses at $2398.55 "corrected for fuel haul only" to "$2,116.38. He then undertakes to obtain the ratio of the out-of-pocket expense to *to* the total line-haul expenses which he states at $20,432,664 and he gets 31.53% to be used in bringing out the ratio of the out-of-pocket expenses shown in line 1 to the total line-haul expenses shown in line 3. Attention is called to the fact that Saunders' figures above stated are much lower than Lamb's figures (See Lamb's Exhibit No. 5, first order of reference). Mr. Lamb states the System out-of-pocket expenses at $6,920,683.75 and the total line-haul expenses at $26,701,014.07 (see last page Lamb's exhibit 5). Saunders' ascertainment of those two amounts is based on this exhibits 70a, 79a and 80a which two latter exhibits will be hereafter discussed. Each of said exhibits is completely

erroneous. It will be noted that he dealt with only line-haul expenses (see caption of exhibit 80a) and did not deal

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[fol. 567] with the remainder of the expenses and that he stated the line-haul expenses at more than $6,000,000 less than they should have been stated as shown by Mr. Lamb's exhibit 5. Saunders emphasizes in his evidence that he is dealing with only "line-haul" expenses, which are different from the expenses dealt with by either Lamb or the Interstate Commission. (R. 517.)

He then dealt with "terminal and switching expenses" which he states at "1051 loaded and empty car- at .30 per car" which is far below the actual cost. The witness McPherson (R. 316) showed there was a switching cost of $2.25 per car at Palatka for getting a car from the Georgia, Southern & Florida yards to the Atlantic Coast Line. Mr. Saunders' ascertainment of that cost was less than one-seventh. He then undertakes to apply the 1930 System operating ratio of 78.84% to his figures "to obtain revenue corresponding to average revenue received by carrier in 1930". The cost of operating in Florida is much greater than the average cost for the System. The percentage used by Saunders did not produce the return on the property used by the carrier in performing this service contemplated by law.

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[fol. 568] Exhibit 72-a (Saunders, R. 464; Lamb, R. 820)

Saunders then offers his exhibit 72a "showing estimate of total cost to Atlantic Coast Line Railroad for movement of log trains, Hines to Palatka, Florida, November, 1930". This exhibit likewise deals with only the line-haulage costs. Line 1 of this exhibit states the out-of-pocket expenses at Lamb's figure of $2,398.55. In his second line he states "all other operating expenses, based on .06 per car mile for 58,503 loaded car-miles, empties returned free—$3,510.18." Saunders bases this exhibit on exhibits 63a and 64a (R. 464). 63a is stated to be a letter dated January, 1926, from the Coast Line to the Atlanta, Birmingham and Atlantic Railway and others referring to reciprocal rental rates and instructions covering equipment rented as *between railroads;* 64a is a contract with Brooks-Scanlon Corporation

concerning 75 steel flat cars by which the Railroad Company was to use the cars and allow the Lumber Company 6 mills per car mile; "said allowance to apply in *both loaded and empty movement* service." That contract had a good many conditions and mutual obligations and the circumstances did not apply to the Hines to Palatka movement, the cost of which exhibit 72a purported to state. This exhibit applied the basis of pay for the cars on "loaded

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[fol. 569] "car-miles, empties returned free." Both lines 2 and 3 of exhibit 72a are based on these reciprocal relations between railroads under certain circumstances as evidenced by exhibit 63a. That agreement and basis of pay thereunder were not applicable to the movement involved in exhibit 72a.

Line 4 takes into account only the "running repairs on locomotives" which Saunders himself defines as "the light repairs such as putting in new brakes and fixing the air holes and the like" (R. 466). Of course, those are only a fractional part of the cost of repairs on locomotives. The running repairs on locomotives in Florida are greater than anywhere else on the System (R. 821).

The next item (line 5) is car rental which Mr. Saunders states at "120,532 loaded and empty car miles at .006 per car-mile—$723.19". The witness Dewey (R. 730) discusses exhibit 63a, upon which this item is based. He described it as a reciprocal agreement captioned "Reciprocal Rental Rates and Instructions to be applied covering equipment rented as between railroads, effective January 1st, 1926" (R. 733). It was for emergency service only between railroads. It was not based upon the cost of the service or the profit in the service (R. 735). The usual rate for the rental

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[fol. 570] of cars between the railroads was $1.00 per day (R. 737). There were relatively few privately owned flat cars for hire. In 1932 there were only 1024 such cars privately owned (R. 737). The rate of six mills per car-mile is very much less than $1.00 per day.

The next item is "Car repairs at actual cost to Lumber Company—$470.16". At record page 822 Mr. Lamb testified that practically all of the repairs made by the Lumber

Company were in replacement of floors of cars and equipment damages due to rough handling in loading logs while the cars were in its possession. Of course those were only a small part of the repairs which had to be made.

Line 7 is "Switching 1051 cars at .30 per car—$315.30." At page 822 Mr. Lamb states:

"The switching cost of 30 cents per car is purely an arbitrary figure, and does not give any consideration to the facilities used at Palatka by the switching crew, and to the idle time of the switching crew and the expenses of making up the cuts of these cars to be handled to Hines."

Exhibit 72a is simply a list of guesses or estimates. The plan or basis of this exhibit applies to an imaginary situation. It does not and could not apply to a carrier moving trains over an established railroad for which engines, cars, roadway, tracks, and stations are maintained and on which the service had to be regular in order to constantly supply a large mill with raw material.

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[fol. 571] Exhibit 73a (Saunders, R. 472; Lamb, R. 823)

Saunders' evidence is further erroneous because it is based on his exhibit 73a which is erroneous in each item. This exhibit purports to be a "Statement showing estimated charges for entire movement of logs, Hines to Palatka, Florida, for November, 1930, based where applicable on regulations dated January 1, 1926, covering reciprocal rental rates and charges as between railroads." The first three items and item 5 (or line 5) are based on the reciprocal agreement as shown by exhibit 63a. As we have heretofore stated that agreement does not apply to such circumstances. (See evidence of Mr. Dewey, R. 730 et seq.) Item 3 states rental of locomotives for 25 days when it should have been for a month. Item 4—running repairs to locomotives—represents only a very small part of the expense of repairs to locomotives. The entire exhibit is based upon leaving the cars at destination. No provision is made for the handling of empties (R. 824). This item alone would change the cost from $9.71 per car to $19.42 per car. It treats the cars and locomotive as being assigned for a trip rather than for a period.

This exhibit is made upon the theory that the transportation of logs from Hines to Palatka was based upon the

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[fol. 572] renting of equipment and motive power, which of course, was not only incorrect but impossible. What was actually used in rendering this service was 119 miles of main-line over an established railroad which was maintained to render regular service in supplying a large mill with a continuous supply of logs. This exhibit does not take into consideration even the line-haul cost.

Exhibit 75a (Saunders, R. 478; Lamb, R. 823)

This exhibit purports to be a "Statement showing estimated charges for movement of one train of logs, Hines to Palatka, based where applicable on regulations dated January 1, 1926, covering reciprocal rental rates and charges as between railroads." It is based on the theory of the operation of one train from Hines to Palatka "and that would comprise the entire movement for one month, there would be no other movement but this one single train of 40 cars." (Saunders, R. 479.) That means exhibit 75a is made upon the theory of a train going 119 miles and staying there; one train for that month with no return of engine or empties. It is based upon figures which take into consideration nothing but reciprocal rentals. It has all the im-

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[fol. 573] perfections which Saunders' other exhibits have. No such circumstances as those on which it is based existed during the period under consideration. The reciprocal agreements do not apply. A one-way movement of this train was impossible. As Mr. Lamb states:

"He creates the impossibility of moving loaded cars before the empties are placed." (R. 826.)

This exhibit can have not possible evidential value. It was objected to by the Coast Line on the grounds stated at R. 480 which included among other grounds that it was "based upon a theory or presumption that is wholly impossible."

The Master did not then rule on the subject. It is one of the objections which was finally overruled in his report.

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[fol. 574] Exhibit 76a (Saunders, R. 484; Lamb, R. 828)

This exhibit purports to restate Lamb's exhibit 12—"Estimated Cost of handling logs Hines to Palatka, Florida," based on cost per gross ton-mile. Saunders uses the same figures that Lamb used for the first eight lines or items; and then he produced an "out-of-pocket expenses per gross ton mile" of .043002. That figure is erroneous. The correctness of Saunders' exhibit 76a depends upon the correctness of his exhibit 70a (R. 485). We have clearly shown that exhibit 70a is incorrect. Furthermore, at page 457 of the record Saunders testified that he took from the Coast Line's report of 1930 the information that they used 109 pounds of coal per thousand gross ton miles for the entire system. He eliminated the locomotive ton miles and made the calculation of 123 pounds of coal for the System average for the year 1930. The actual number of tons used by the Third Division per 1000 gross ton-miles was very much larger than that for the System. To illustrate: In 1932 it used 195.5 pounds while the System used 144.2 (R. 812). This exhibit does not undertake to state anything but the haulage expenses. There is an incorrect calculation even

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[fol. 575] of Saunders' statement. (See Lamb's evidence, R. 829.)

Saunders' exhibit 76a does not take into account the fin-ing of the Interstate Commerce Commission in its report (186 I. C. C. 184) to the effect that the expenses found by the Commission for this movement "are understated to an unknown extent." Saunders finds the cost of this movement very much less than the Commission found it, and undertakes to set up a rate which would produce very much less than the Commission has found to be the minimum rate necessary to remove unjust discrimination against interstate commerce. Saunders' treatment of the Commission's report may be seen by his evidence beginning at record page 520 through 525. Saunders states at R. 520:

"Q. Don't you know that the main traffic in Florida is less dense?

A. Yes.

Q. In Florida than on other parts of the system?

A. Yes, in ton miles it might be.

Q. Now is there anything in what you have said that differs or challenges this statement on the part of the Commission in its report on page 183: 'There appears to be no doubt that the operating costs per unit are generally higher in Florida than the average for the defendant's system as a whole either including or excluding Florida'?

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[fol. 576] A. That is the total operating cost. *I didn't make a finding on the total operating cost.*

Q. You don't take issue on that?

A. *I have not made an investigation of that part.*" (Italics added.)

So Saunders' evidence must be read in the light of his statement that he did not try to find the total operating costs of the transportation under inquiry. Yet the total and not a partial cost must be paid by the railroad.

Exhibit 78a (Saunders, R. 488; Lamb, R. 834)

This exhibit is made up of various reciprocal emergency charges and is based upon minimum costs obtained from disconnected agreements between various parties, some of which were never consummated. (R. 834-35.) Like Saunders' other exhibits it does not purport to deal with anything except the line-haulage expenses. What has been said as to Saunders' other exhibits applies to Exhibit 78a.

Exhibits 79a and 80a (Saunders, R. 490; Lamb, R. 837)

Exhibit 80a is an explanation of Exhibit 79a. In Exhibit 79a Saunders undertakes to ascertain what he is pleased to call "weighted average operating expenses

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[fol. 577] (freight)," then the total System line-haulage expenses; then the total Florida line-haulage expenses (see sheets 1, 2, 3 and 4; columns 5, 6, 7 and 8). The word "weighted" has nothing to do with pounds. It probably might be translated as "estimated." He takes the expense for the year 1929 beginning with February 8th; all of the year 1930 and 1931 from January 1 to March 5 and used 43.3% for 1929; 48.2% and 8.5% for 1931. That is he makes up a kind of synthetic year (R. 490). He then proceeds to

eliminate "accounts which were not directly applicable to line-haul expense" (R. 490). The accounts eliminated are shown in column 6 where the figure "0" appears. In ascertaining the total System line-haul expenses he entirely eliminated 36 accounts and partially eliminated 64 accounts. Out of 119 accounts he included all of only 19. On the 4th sheet we find he ascertained in column 7 for the System's total line-haul expenses $20,432,664, while the "weighted average operating expenses (freight)" shown in column 5 for the synthetic year are $34,353,062. Subtracting the figure shown at the bottom of column 7 from that shown in column 5 we find that he eliminated $13,920,398 of expenses.

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[fol. 578] His purpose was not to bring forward the total operating expenses but only those which were applicable to line-haul.

The method of distribution or apportionment of these accounts is set out in column 2 of Exhibit 80a and each group of accounts has a different "basis of apportionment." In the plan which is denominated by Saunders as "Basis of apportionment of line haul operating expenses for the Atlantic Coast Line System to the State of Florida," the various line-haul expenses are apportioned to the various accounts. Exhibit 80a and those bases are referred to.

The witness J. E. Willoughby, Chief Engineer for the Coast Line, gave evidence as to those bases (R. 672, et seq). In his testimony Mr. Willoughby gave detailed evidence as to each of Saunders' basis of apportionment. For instance, the first bracket shows an error in the bare matter of mileage. Mr. Lamb discusses many of these basis of apportionment (R. 837, et seq). At R. 840 Mr. Lamb states:

"It is absurd to use the percentages of costs of reproduction new as of June 30, 1917, for the apportionment of expenses of 1929, 1930, and 1931. Since as late as 1922 there has been actually expended in Florida approximately thirty-two millions of dollars, or a 50 per cent. increase in the investment in road and equipment, 1931 over 1922. Therefore, these percentages are all valueless and it necessarily follow- that the application of these percentages to the expenses of the average year 1929-1931 produced erroneous results. As a matter of fact, some of these percentages would be increased over 100 per cent."

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[fol. 579] The Coast Line states there is not a single conclusion of the witness Saunders in either of these exhibits which is correct. To undertake to summarize the evidence of the witnesses Lamb and Willoughby would take these exceptions out of bounds. The court is respectfully referred to Saunders' exhibit- 79a and 80a and the evidence of Messrs. Lamb and Willoughby as heretofore cited.

A sufficient reason for putting aside the evidence and exhibits of Saunders is that no where does he undertake to state the entire cost of the transportation involved. He never deals with anything more than the line-haul expenses.

Exhibit 81a (Saunders, R. 499; Lamb, R. 843)

Exhibit 81a purports to be a "statement showing Florida line haul expenses assigned to log traffic." Column 2 purports to show the total line haul expenses in Florida and column 3 the amount assignable to log traffic on basis of ton miles and Saunders uses 3.18%. Column 4 is the amount adjusted for nature of log traffic; column 5 is the

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[fol. 580] amount subject to special adjustment, if any; and column 6 is final expense assignable to log traffic which he states at $102,046. The witness Lamb testified that this item is "based on exhibit 79a and all of the errors reflected in 79a are perpetuated in exhibit 81a." (R. 842.)

(d) The Master found:

"Mr. Lamb, a witness for the defendant found the cost per car to be $23.12; taxes $3.56 and 5¾% on investment $7.62, making a total of $34.30 per car. In view of what Mr. Lamb and the I. C. C. said, this estimate should not be given the same consideration as other estimates made. It will be observed that in other computations referred to below the difference between cost per car or cost per car with taxes and 5¾% added and revenue per car is a substantial amount"; for that

said finding is too indefinite, and is not sustained by the findings of the Interstate Commerce Commission referred to.

(e) The Master made the following findings in said paragraph 8 of his report:

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[fol. 581] "Mr. Lamb, in another calculation, based on these averages in same period found per car $17.00 costs; $2.62 taxes, and $5.61 as 5¾% on investment, making total of $25.23. The average revenue received was $31.12 per car. The difference between costs with taxes and $5.61 as 5¾% on investment added and revenue is $5.89. Mr. Lamb says his cost figure per car understates the costs.

The I. C. C. made an estimate, based on same averages, and found per car costs $17.07; taxes $1.99 and 5¾% on investment $5.63, making total of $24.69. The difference between cost with taxes and $5.63 as 5¾% on investment added and revenue of $31.12 is $6.43. The I. C. C. says 'The above figures undoubtedly understate the costs for several reasons' given. This calculation was based on system average. There is only a difference of seven cents between the total haulage costs in above finding of I. C. C. and last finding stated of Mr. Lamb.

In 186 I. C. C. 182, et seq., computations show during the month of November, 1930 for the trainload shipments in the Hines to Palatka movement, costs per car $18.51; taxes $2.85 and 5¾% on investment $6.10, making total $27.52. Revenue per car was $41.60. The difference between costs, with taxes and $6.10 as 5¾% on investment and revenue is $14.08 per car. The I. C. C. says that this finding is too low because in the Hines to Palatka movement hauling was made in trainload shipments, with but little terminal expenses;"

for that:

(1) All of said findings are indefinite, confusing and inaccurate. The finding of the witness Lamb's figure of $34.30 per car should be $34.32 (see exhibit 7 before the Master, May 1932 hearing).

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[fol. 582] (2) The Master's report does not correctly describe Mr. Lamb's exhibit No. 7 (R. 343, et seq., May 1932 hearing). It is a statement of the estimated cost of handling logs in Florida for the average distance of 81.36

miles, based on out-of-pocket expenses assigned to Third Division (Florida) and is stated in two forms. One is under column A and estimates the cost at $25.24 per car; the other is under column B which estimates the cost at $34.32 per car. The difference between the two columns is that the costs shown under column A do not include any terminal or yard expenses and exclude a number of other items which excluded items aggregated $9,607,798.67. (R. 344, May 1932 hearing.)

The Interstate Commerce Commission found in its report in 186 I. C. C. at 179 that:

"There were deducted, first, all freight yard accounts, 42 in all, the total of which aggregated $4.550,039. Then all amounts in 15 other accounts, aggregating $4,665,936, were completely eliminated. Many of these were obviously not directly attributable to the handling of logs, such as wharves and docks, paving, assessments for public improvements, floating equipment, outside agencies, advertising, traffic associations, and industrial and immigration bureaus. Some of the others were clearly attribtuable, at least in part, to the handling of logs but were entirely omitted because of the difficulty of ascertaining the proper proportion that should be allocated to that traffic. For example, station employees in the transportation block of expenses, account 373, shows charges to freight of $3,-281,352.20. There would seem to be no doubt but that a portion of the charges to this account is properly attrib-

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[fol. 583] utable to the handling of logs. To this account are charged agents, clerks, and attendants, telegraph and telephone operator, station agents, etc., who handle the billing of log shipments and perform other services. But that account was entirely eliminated. Finally there was eliminated 4.4897 per cent of general expenses, amounting to $413,769."

The Interstate Commission ascertained that the amount eliminated by Lamb was too great. Lamb made the deductions for the reason that he was dealing with the Division average; that is, the average of freight expenses for the Third Division. This included the hauling of perish-

ables which is more expensive, but the Commission found that the deductions made by Mr. Lamb were more than were necessary or proper to compensate for the fact that he had used the Division average. Mr. Lamb's testimony therefore is not discredited by the Commission but confirmed by it with the declaration hereinafter pointed out that the cost of his movement was understated by Lamb. (186 I. C. C. 185, 186 and 187.)

Mr. Lamb's exhibit No. 5 is a statement of the Railway operating expenses of the Coast Line for the calendar year ending December 31, 1929. It first shows in columns the total expenses and the freight expenses, then he shows the eliminations from the freight expenses aggregating $9,607,798.67. This amount is deducted from the total freight expenses of $36,308,812.74, leaving $26,701,014.07. (See Lamb's exhibit No. 5 and record pages 332, et seq. of the May, 1932 hearing.)

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[fol. 584] It is these deductions in the above quotation that the Commission points out as having been too great (186 I. C. C. 179). Mr. Lamb pointed this out himself at record page 332, et seq. (May 1932 hearing) before the Commission made its report.

Mr. Lamb then introduced his exhibit No. 7 which has been described above. He stated that column A of his exhibit 7 "substantially understated" the cost of handling the logs for the average distance of 81.36 miles because of the elimination of expenses which might have properly been charged against that traffic (R. 349, May 1932 hearing); and that the figures shown in column B "perhaps overstate" that cost.

Mr. Lamb introduced exhibit 12 made on the same basis as his exhibit 7 but for the haul from Hines to Palatka—119 miles—and showed the cost for that distance to be under column A $38.58 and under column B $52.48 (R. 357, May 1932 hearing).

(Reference is made to Lamb's exhibits introduced at the hearing on the first order of reference, Nos. 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15 and 23 and his evidence delivered in May, 1932, beginning at record page 307 and continuing through his entire evidence; also 186 I. C. C. beginning at page 176 through 187.)

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[fol. 585] The Interstate Commission, after computing the cost of handling logs in Florida for the average distance of 81.36 miles at $24.69 per car, said:

"The above figures undoubtedly understate the cost of transporting logs in Florida is that these average costs per these is that cost per unit in Florida are higher than the average for the entire road or system including Florida. Another reason why the computation on the basis of average costs per unit for the system understates the cost of transporting logs in Florida is that these average costs per unit do not include anything for joint-facility and equipment rents;" etc.

(Reference is also made to Mr. Lamb's testimony at record pages 810 et seq. and 1196 et seq. of the hearing in July, 1933, on the second order of reference; also to his exhibit 75b.)

(f) The Master states:

"In the record there are calculations of others which estimate the total haulage cost to be less than the estimate made by Mr. Lamb and the I. C. C., above referred to. Some very much less. If they were treated as correct, the return on investment from the revenue received would be shown to be Very High. (sic). For instance, Mr. Saunders, a witness for claimants, in his computation of the Hines to Palatka movement, after eliminating charges for transporting company coal, found the cost per car $14.11, and after eliminating other out-of-pocket expenses, which he said should be eliminated, found the cost per car $12.11. After adding to the former $2.52 for taxes, and $4.65 for 5¾% on investment, his figure was $31.28, and after adding

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[fol. 586] to the latter $2.11 for taxes and $3.99 for interest on investment, his figure was $18.21. The revenue per car was $41.60. Counsel for claimants in their brief say the return on investment per car in one instance would be 30.87% and in the other 39.44%. There were other estimates lower than those of Mr. Lamb and the I. C. C."

The Coast Line excepts to said statements and for exceptions says:

(1) The said statements are not findings of fact.

(2) The Cost findings of the witness Saunders are valueless for each of the reasons hereinbefore set out.

(3) And for that the evidence of Saunders did not purport to ascertain even the total operating costs. He made no investigation of that (R. 520, second order of reference). The operating costs are not all the costs to be attributed to any traffic movement, but Saunders did not even undertake to make a statement of all the operating costs.

(g) The findings of the Master in paragraph 8 of his report bring forward his previous finding that the traffic in Florida is not less dense than the traffic on the System, which is contrary to the evidence in this case and to the findings of the Interstate Commission in this cause. (186 I. C. C. 157, 163, 164, 183 and 187; and record pages heretofore and hereafter cited.)

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[fol. 587] (h) The Coast Line excepts to the following part of the findings of the Master in paragraph 8 of his report:

"The Master finds that the charges made by the Atlantic Coast Line Railroad Company for shipments by claimants of logs over the railroads of the Atlantic Coast Line Railroad Company in Florida, from February 8, 1929 to March 5, 1931 were not proper or lawful charges but were higher than proper or lawful charges and that the total principal amount that claimants should recover from the defendant, The Atlantic Coast Line Railroad Company, as and for overcharges on said shipments during said time shall be $99,941.77, which is 34% of the total or aggregate principal amount claimed by the claimants against the Atlantic Coast Line Railroad Company on account thereof during said period. The aggregate or total principal amount thus claimed by the claimants is $293,946.38 principal, and claimants shall recover as total principal amount from Atlantic Coast Line Railroad Company 34% of that sum besides interest on the same as hereinafter stated. Said $99,941.77 is

an amount (34%) thirty-four per cent lower than the amount of the difference between the aggregate amount that would have been collected from February 8, 1929 to March 5, 1931, respectively, on each of said shipments under the Cummer scale and the aggregate amount actually collected under the charges made respectively, on each of said shipments during said time";

and for exceptions says:

(1) Said finding is contrary to the law; contrary to the evidence. It is based upon all the errors contained in said report to which reference has been made, including the taking into consideration of the mileage over which shipments originating or ending in Florida moved on the Atlantic

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[fol. 588] Coast Line out of the State of Florida in determining the density of traffic; and in finding that the density of traffic in Florida was not lower than the density of traffic for the system; and in finding that the cost of freight operation of the Atlantic Coast Line in Florida was not greater than for the system excluding or including Florida.

(2) And for that said report and its findings do not give adequate effect to the findings of the Interstate Commerce Commission made in its considerations of this subject matter, in which proceedings before the Commission all of said claimants appeared in person or by representation, and which proceedings are reported in 146 I. C. C. 717; 186 I. C. C. 157; and 190 I. C. C. 588, to which reference is made. The findings of the Commission in each of said proceedings should have been held to be conclusive.

The Master does not find that the rate which he has fixed for this transportation service would have carried its fair proportionate part of the operation and maintenance of the transportation system used in intrastate and interstate commerce. There was no evidence adduced by the claimants before the Master to justify such a finding.

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The cause was tried, by the claimants before the Master [fol. 589] on the theory that the Interstate Commerce Act of Congress did not apply.

The rates used by the Master in fixing the amount of restitution would have been unjust, unreasonable and confiscatory.

The rates used by the Master as the basis of his calculation when computed upon a car of 56,471 pounds of logs (the average) produce earnings which are below the average transit rates on the railroads in the Southern territory applicable during the period involved to such transportation by 20.8%. (Perrin's exhibit 54b.) When compared with the earnings per car under the lowest transit rates on railroads in the Southern territory applicable to such transportation during said period they were 12.3% lower (Exhibit 54b).

The rates used by the Master are lower than the corresponding rates in use during the period involved for intrastate transportation in Virginia by 11.1%; in North Carolina by 1.3%; in South Carolina by 11.7%; in Georgia by 2.2% and in Alabama by 13.4%. When compared with the Class P rates prescribed by the Florida Commission, they are lower by 17.3% (Exhibit 60b).

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[fol. 590] The rates used by the Master when applied to a car of logs of the average weight of 56,471 pounds would have produced earnings 14.4% less than a like car contemporaneously moving the same distance over the Seaboard Air Line in Florida (that is, when the weight of the logs is calculated on the basis of ten pounds to the foot; and when the weight is calculated on the basis of eleven (11) pounds to the foot, the rates used by the Master would produce 5.8% less revenue than from a like car contemporaneously moving over the Seaboard Air Line (Exhibit 28b); 16.6% less than from a like car contemporaneously moving over the Southern Railway in Florida (exhibit 60b); and 17.3% less than from a like car moving contemporaneously over the Florida East Coast Railway in Florida (Exhibit 29b).

(3) And for that the Interstate Commerce Commission has found that higher rates should apply on traffic in the Florida peninsular south of the line of the Seaboard Air Line from River Junction to Jacksonville than in other parts of the south; and this finding has been made in a number of cases, including

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[fol. 591] Southern Rate Investigation, 100 I. C. C. 513, 626, 646;
Rates on Chert, Clay, Sand and Gravel in State of Georgia, 140 I. C. C. 85;
Petroleum and Its Products, 171 I. C. C. 286, 331, 332;
Southern Cement Rates, 132 I. C. C. 427;
Fresh Meat and Packing House Products, 191 I C. C. 257 (decided February 7, 1933);
Edgar Plastic Kaoline Co. v. Atlantic Coast Line Rd. Co., 194 I. C. C. 292 (decided May, 1933).

The additional charge for the Florida peninsular has been placed at various percentages. In the Petroleum case above referred to the percentage was fixed at 40.

Like decisions have been made by the Interstate Commission in the case at bar as to the lack of density of traffic in Florida and the higher cost of service in Florida. See 186 I. C. C. 163, where it is stated:

"Transportation conditions in Florida are not such as warrant a lower basis of rates on logs in that State than elsewhere on defendant's system. Transportation conditions on defendant's lines in Florida are not more favorable but on the contrary are less favorable than on defendant's system outside of Florida. The cost of the service in Florida is higher than on the remainder of the system, as shown by cost evidence referred to in detail hereinafter. Density of traffic in Florida is much lighter than on defendant's lines elsewhere."

See also 186 I. C. C. 164 with table; and 186 I. C. C. 183,

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[fol. 592] where it is stated:

"There appears to be no doubt that the operating costs per unit are generally higher in Florida than the average for the defendant's system as a whole either including or excluding Florida;"

and 190 I. C. C. 599. Evidence to the effect that the density of traffic is less in Florida than for the remainder of the System and that the costs are greater in Florida than for

the balance of the System, is found at record pages 322, 323, 324, 325, 326, 520, et seq., Lamb's exhibit No. 3, May 1932 hearing); evidence of the witness J. L. Gholson, May 1932 hearing; and record page 834 (2nd order of reference) where Lamb testified:

"The element of density of traffic is not measured by the number of tons of freight, but by the number of ton-miles per mile of road, and it has been clearly shown in this record that in the year 1930 the ton miles in Florida were 369,979, while for the System, excluding Florida, they were 648,399. This indicates that the ton-miles per mile of road in Florida were only 57.06 per cent of the System ton-miles. This is one of the elements creating the higher cost in the State of Florida as compared with the balance of the System, because of the short haul in that State compared with the System, excluding Florida."

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[fol. 593] The Master finds:

"The traffic density in revenue ton miles per mile of road in Florida is less than revenue ton miles per mile of road on defendant's system as a whole." (See finding under paragraph 6, at page 26 of the report.)

He does not give effect to that finding for that in ascertaining density of traffic in Florida, he states:

"Density of traffic consists, not only of volume of business, but the length of the haul." (See page 23 of his report.)

By that he means the length of the haul outside the State of Florida. This is erroneous.

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[fol. 594] (i) The Coast Line further excepts to said finding for that in the course of the hearings in this case the Master received in evidence from the claimants, over the objection of the Coast Line, which objection was seasonably made, exhibits 1a-8a, inclusive, 12a-14a, inclusive; 17a-41a inclusive. Defendant's witness Perrin analyzed these exhibits and considered them in three distinct groups, supporting his testimony by three master exhibits 17b, 27b,

and 37b. His testimony begins at page 973 of the record. The first group analyzed by him contains tariffs that carry rates per car regardless of weight (Defendant's exhibit 17b, R. 973-986). Mr. Perrin testifies:

"As exhibit 17b I offer a tabulation of these tariffs which I think will expedite and clarify the future proceeding. For convenience I have given my own item numbers to each of these tariffs or supplements because in numerous cases there are several tariffs or supplements in the same exhibit.

Q. By item numbers you mean the numbers in the first column of these exhibits?

A. Yes, sir, and I have numbered these items consecutively so that a reference to the item will mean a reference to the paragraph. Now items 16 and 17 are not applicable on pine. Item 14 is a duplicate of item 9. Items 21 and 23 contain no rates. In other words, these items cover supplements that were issued for such reasons as emergency charges or changes on receiverships and for such reasons as that. Item 6 is embraced in item 8 so far as the rates are concerned. Now there are left 29 tariffs or supplements. Of this total number of 29 tariffs or supplements 22 show dates of expiration, indicating that particular change to meet truck competition; 22 are subject

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[fol. 595] to transit, and 26 are restricted to apply to specific destinations; 25 were issued to become effective as late as 1932 and 1933. The only rates of this character, that is, rates per car regardless of weight, that were in effect during the restitution period are the rates of the Mississippi Central Railroad to Bude and Hattiesburg, Mississippi, in item 15; the rates of the Kentucky and Tennessee Railroad to Hemlock, Kentucky, item 31; the rates of the Bonhomie & Hattiesburg Southern to Beaumont, Mississippi, item 33; and, incidentally, the last three tariffs cover tariffs that apply for maximum distances of 20 miles and 27 miles respectively."

Q. "How about 29, was that in effect during the restitution period?

A. "Yes, sir; Seaboard Air Line Railroad to St. Marys, Georgia; I mentioned that, no I did not, I overlooked that;

the Seaboard to St. Marys, Ga., and that is a matter of less than 20 miles, I think about 12 or 15 miles."

A. "I would like to call attention to the fact, although I have probably previously stated it—26 out of these 29 tariffs are applicable to specific destinations."

Mr. Perrin then offers a series of exhibits, 18b-26b inclusive, explaining in detail the various tariffs in this exhibit (17b). His analysis shows that many of the tariffs became effective substantially after the end of the period under investigation in this case, which period ended in March, 1931. Said tariffs had been filed more than one year thereafter and in some instances nearly as much as two years thereafter. Many reflect rates involving transit privileges, which are on the same basis, within a narrow fluctuation, as the scale of rates prescribed by the I. C. C. and on which the log shipments moved in Florida during

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[fol. 596] the period of restitution.

Perrin next takes up his second group (Rates per 100 pounds, or 1000 feet, or carloads of defined weight). His exhibit 27b supports this testimony (R. 986 to 1021). This exhibit has 33 items also; 19 of which are transit rates; 11 with effective dates after the end of the restitution period—March, 1931; 3 contain definite expiration dates; item 17 was cancelled in 1926; 3 cover the same tariff and are embraced in one item; and 2 others are embraced in one item.

Perrin then takes up claimants' exhibit 1a (item 1, Seaboard Air Line rates in Florida) in his exhibit 28b. On reducing the rates contained in that tariff, which are stated in cents per thousand feet to cents per hundred pounds, which is the basis used by claimants in their tariff claims in this case, using 10 pounds to the foot, he demonstrates that the I. C. C. scale on logs is approximated within narrow fluctuations. The other items of exhibit 27b are dealt with by Perrin in testimony and are supported by his exhibits 29b to 36b, inclusive, and the rates, where lower, are shown to be so by reason of extraordinary circumstances; limited as to duration, and filed for such reasons as: a forest fire in South Florida; truck, short line or other competitive influences; applicable on shorter distances

[fol. 597] than the mileage scale laid down by the I. C. C.; many of them were cancelled before the period involved in this case began and most of them are in different localities reflecting different conditions and effective at a different time.

The third group (tariffs on commodities other than logs, such as pulp wood, waste wood, etc.) are analyzed by Perrin's exhibit 37b (R. 1021 to 1039). This exhibit has 22 items; 14 of which were effective subsequent to March, 1931—the end of the period involved in this case. Perrin's testimony is supported by his exhibits 38b to 42b. In exhibit 39b the general level of waste wood rates in the Southern territory is determined after reducing cords to pounds, the rates being stated in cents per cord rather than cents per pound, and compared with the I. C. C. scale on logs, it fluctuates within narrow limits as the distance corresponds to the mileage scale set forth in the I. C. C. tariff on logs. The rates on creosoted timber show a transit feature which allows a through rate on such lumber from point of origin to ultimate destination, with creosoting privileges at named points. In exhibit 41b the rates on mine timbers over the Interstate Railroad in Southwest

[fol. 598] Virginia are compared with the I. C. C. log scale and are shown to be nearly 50 per cent higher. Items 1 and 15 of exhibit 37b are rates on short logs in Florida. Perrin gives the full history of this rate at page 1030a of the record and shows that they reflect an abnormal situation due to the manner of development of these log rates. (See page 46 of these exceptions—Item 7, ¶ (j).)

Perrin (R. 1039-40) testified as to the rates applicable to shipments in the Southern territory (the Southern territory includes that portion of the Southeastern part of the United States south of the Ohio and Potomac Rivers and East of the Mississippi). He stated that the exhibits which he filed "show that our lines (the Coast Line) and the other lines using the rates that I thus submit carry practically all the log traffic of the South.

Mr. Perrin's exhibit 44b lists 29 railroads in the Southern region whose tariffs he analyzed. Those roads carried 9,484,259 tons of logs during the years 1929 and 1930. 15

of these roads; together with the Coast Line carried 94 per cent of the log traffic carried by Class One railroads in the South. (R. 1053). Mr. Perrin did not contend that all these log shipments moved under the I. C. C. scale of rates or under the same rates fixed by State authority, but he did claim that more than 90 per cent of the logs shipped in the Southern territory moved under those scales during the period involved in this case.

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[fol. 599] (j) And for that the rates which were charged by the Coast Line for the transportation of logs over its lines in Florida during the period involved were the same rates as were charged in interstate commerce throughout the Southern Territory; and the rates charged by the Coast Line were either exactly or approximately the same as the transit rates which were charged intrastate during the period involved on the Illinois Central Railroad and the Yazoo & Mississippi Valley Railroad, except as to Memphis; and also as were charged on the Illinois Central Railroad in the Hickman District; and also as were charged on the Illinois Central and the Yazoo & Mississippi Valley Railroads to Memphis, when for manufacture and reshipment on either of those lines.

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[fol. 600] The rates charged during this period by the Coast Line were applicable between points on the Louisville & Nashville Railroad; between points on the Mobile & Ohio Railroad; between local stations on the Gulf, Mobile & Ohio Railroad; they were applicable on Mississippi intrastate traffic from points on the Gulf, Mobile and Northern Railroad, between many of its stations; they were applicable between points on the Gulf and Ship Island Railroad for manufacture and reshipment via the Gulf & Ship Island Railroad, the Illinois Central Railroad, or the Yazoo & Mississippi Valley Railroad; they were applicable between stations on the Tennessee Central Railway (Witness Perrin's exhibit 54b).

Those rates, or approximately the same rates, were applicable between points on the Southern Railway, as set out in exhibit 48b; in North Carolin- and Virginia intrastate commerce; and in interstate traffic on the Seaboard Air

Line; in interstate traffic between points on the Central of Georgia Railway; and on other lines, as shown in exhibit 48b.

The witness Perrin (R. 1065-6) explained exhibit 54b, stating in substance that it contained transit rates. Exhibit 54b does not contain any local rates as distinguished from transit rates. The Coast Line and the other railroads

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[fol. 601] in the Eastern part of the South made their log rates without transit features, but made the level of the rates conform to the level of transit rates of the lines in the Western part of the South. The rates set out in exhibit 54b continued in effect throughout the period involved in this case (R. 1066, 1067). The roads referred to in exhibit 54b had local rates which were much higher than the transit rates shown in said exhibit.

Reference is made to exhibits 59b and 60b; 60b being an analysis of 59b. They show that the intrastate rates in Virginia over the Coast Line during the period involved were the same as the interstate rates in that State; that is, the same as the rates charged in Florida.

The intrastate rates in South Carolina between points on the trunk line railroads operating in that State were the same as the interstate rates. Those rates were slightly reduced, as shown in column 3 of said exhibit, effective September 1, 1930. There was very little difference between the two rates. For the bracket of 119 miles (the distance from Hines to Palatka) there was no difference. The local Georgia rate applicable during this period was very much higher than the interstate rate.

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[fol. 602] There was, however, a transit rate in Georgia which was somewhat lower than the interstate scale which the Georgia Commission undertook to raise to the interstate scale. That was made impracticable by this litigation. The rates applicable over the Florida East Coast during this period were practically the same as the interstate rates, being for the most part somewhat higher. The rates over the Seaboard Air Line were published in cents per thousand feet, but converted to cents per hundred pounds on basis of average weight of ten pounds per foot.

Those rates were practically the same as charged by the Coast Line during this period. The intrastate rates were the same or very nearly the same. The average of those rates was practically the same as the interstate rates.

(k) The Coast Line excepts to the following part of the findings of the Master in paragraph 8 of his report:

"Statements were made in the reports (reports of the I. C. C., especially the report of August 2, 1928, in this matter) that all shippers to whom the increased rate applied might ask for a change of it and a change would be made, if conditions made a change proper. In the subsequent reports of July 5, 1932 and January 9, 1933 rates were established for future application. Conditions were then different from what they were during the period of restitution;"

[fol. 603] for that said statement of the Commission is not and can not be the basis of any finding. On the other hand, it shows that the Commission had considered the conditions in its subsequent reports and had found that circumstances did not justify a reduction in the rates or the relief sought. Said statement is too indefinite to be made the basis of any judicial action.

(l) The Master states in paragraph 8 of his report:

"In some decisions heretofore cited it was held that in hearings to determine what should have been past charges during a specified period, findings of a Commission made subsequent thereto fixing a rate for future application are not even admissible."

The Coast Line excepts to said statement and for exceptions says that it is too general and indefinite to be the basis of judicial action.

Further, because the said statement is inapplicable to this cause, for every person making claims against the Coast Line in this proceeding has been a party to the proceeding before the Interstate Commerce Commission, either directly or through the Railroad Commissioners of Florida, and they have had their hearings before the Commission

and took part in shaping the proceedings before said Commission.

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[fol. 604] The Coast Line excepts to the findings of the Master in paragraph 9 of his report, captioned: "Rulings on Objections to Testimony", and for exceptions thereto says:

The Coast Line made many objections to evidence offered by claimants before the Master. It specially and earnestly objected to the admission of the tariffs listed in exhibit 17b and testimony regarding them. Those tariffs were filed by the railroads shown on said exhibit other than the Coast Line to meet emergency conditions, such as truck competition and other railroad competition, or the two combined. The rates in said tariffs were based upon carloads, without regard to the weight of the contents of the cars. None of those tariffs became effective during the two-year period involved in this case. The tariffs were, and could, not be the standard of the proper charges for transportation during the period involved. They were filed with the respective Commissions from one to two years after the close of the period under inquiry. They were such as to permit and practically require discrimination against persons, places, other classes of traffic, and against interstate commerce. The Master did not make rulings on any of those objections at the time the evidence was offered and the objections made thereto. The ruling made by him in paragraph 9 of his report overrules all of the Coast Line's said objections. Those tariffs were before the Mas-

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[fol. 605] ter at the time he made his report. The evidence was irrelevant and should not have been allowed to remain in the record. (See pages 46, 47, 48, 49, 58, 60, 63, 64, 67, 68, 72, 85, 91, 97, 104, 105, 125, 126 and 129, 2nd order of reference.)

The effect of this evidence was to apply to the transportation which was had in the period involved—February 8, 1929, to March, 1931—rates which were not then in effect; a basis of ratemaking which was founded upon the unsound and illegal premise of allowing different quantities of

transportation to different persons over the same railroad mileage and between the same points and in the same train at different rates, the one discriminating against the other to an extent and in a manner forbidden by the Act of Congress known as the Interstate Commerce Act and especially sections 2, 3, 13 and 15a thereof.

There were in excess of thirty objections to oral testimony which was clearly inadmissible under the rules of evidence. The Master in nearly every instance stated he would rule on the objections in his final report. Three objections by the Coast Line to the class of evidence were ruled on by the Master. All others were not.

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[fol. 606] T. M. True, witness for the claimants, testified at pages 46-49, 125-128, 168-169, 1148-1151 of the record. His testimony was objected to in each instance on general and specific grounds. These objections were overruled by the Master and are fully related in the record.

M. L. Fleishell's testimony and objections thereto are found at pages 270-83; C. R. McPherson's at pages 301-334 and 1287; J. S. Foley's at page 380; A. B. Cummer's at pages 397 and 1294; and D. B. Green's at pages 546-64 and 1144.

A large number of tariffs and exhibits analyzing those tariffs were filed by the claimants: Nos. 1a-28a, found at record pages 51-216; 31a-42a, record pages 247-252; 93a-95a, R. 582-83; 106a, R. 1299, all of which were objected to on general grounds as well as specific grounds. (See also R. 16, 18, 22). They were irrelevant and immaterial; remote in time and locality and did not reflect the same transportation conditions as surrounded the log shipments here under investigation. The Master overruled each and all the objections to these exhibits and the evidence given in connection therewith. Analysis of these tariffs showing their irrelevancy is made by the witness Perrin for defendant and are fully explained by his exhibits 17b, 27b and 37b, R. 971, et seq., 986, et seq., 1021 et seq.

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[fol. 607] Claimants introduced eighteen contracts between shippers and railroads involving trackage agree-

ments and other transportation agreements (R. 5, 6); exhibits 29a-38a, R. 222-29; 52a-65a, R. 417-430; 91a, 92a, R. 565; all of which were objected to as irrelevant and immaterial and on other specific grounds. These agreements showed on their face that they were made by railroads as private carriers and not pursuant to the common law duties of railroads as public or common carriers. They involved transportation over short distances only. The Master overruled each and every one of said objections.

Claimants' witness H. J. Saunders testified as an expert and based his testimony on several cost studies: exhibits 70a-89a, R. 444-533. His testimony and exhibits were objected to as being irrelevant and immaterial; not based upon correct figures; excluding important facts which go to make up the cost of transporting logs; besides other specific grounds. The Master overruled all these objections; considered all Mr. Saunders' evidence, and necessarily based his findings thereon.

The Master in failing to exclude the testimony objected to by the Coast Line required a mass of testimony from it, explaining and analyzing claimants' exhibits, which increased the size and complexity of the record to an unwarranted extent.

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[fol. 608] The action of the Master in overruling the Coast Line's said objections to said evidence was prejudicial to it.

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The Coast Line excepts to the report and findings of the Master as a whole on each and every one of the grounds of exceptions set out in these exceptions to the Master's report.

Wherefore, Atlantic Coast Line Railroad Company respectfully prays that the Master's report be not adopted; that it be set aside and annulled; and that this Honorable Court render a decree holding that this defendant is not liable to make restitution to the claimants, or any of them,

in any sum whatsoever; and that this defendant be discharged with its costs reasonably expended in this behalf.

Respectfully submitted, F. B. Grier, Carl H. Davis, W. E. Kay, Alston, Alston, Foster & Moise, Attys. for A. C. L. R. R. Co.

November 25, 1933.

[fol. 609] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

No. 514, No. 511, No. 512

[Titles omitted]

EXCEPTIONS OF WILSON LUMBER COMPANY OF FLORIDA TO THE REPORT OF THE SPECIAL MASTER—Filed November 25, 1933

Comes now the petitioner, Wilson Lumber Company of Florida, and objects and excepts to the report filed herein by the Special Master under the orders of reference and re-reference herein, said objections and exceptions being in the particulars hereinafter set forth.

Exception No. 1

Petitioner excepts to the failure of the Master to find that the Cummer Scale of rates was the scale of rates lawfully in effect in the State of Florida applicable to petitioner's ship-[fol. 610] ments during the period of restitution herein and to award petitioner restitution in the amount of the difference between the charges collected and charges that would have been collected had such Cummer Scale been applied to each and every shipment made by the petitioner. As grounds for the said objection and exception petitioner avers the following:

1. Failure to so find is contrary to the evidence and to the law.

Exception No. 2

Petitioner excepts and objects to the Finding No. 2, entitled "Burden of Proof," as follows:

(a) So much thereof as finds that the sums collected from petitioners are presumed to have been under proper charges.

(b) So much thereof as finds that the burden is upon petitioner to show that the charges collected from it were not just and reasonable charges or were extortionate or oppressive.

(c) To so much thereof as finds that the burden is upon petitioner to show what would have been just and reasonable charges before any recovery can be had by it.

As grounds for said objections and exceptions the petitioner avers each of the following:

1. That the aforesaid findings are contrary to law.

2. That the order under which the charges were collected was an unlawful order of the Interstate Commerce Commission which this Court should have set aside in the first instance and therefore can give no validity or presumption of reasonableness to the action of the defendant in collecting such charges.

3. That such charges having been collected without lawful authority, the burden is on the defendant to establish that such charges were just and reasonable charges for the service rendered.

[fol. 611] Exception No. 3

Petitioner excepts and objects to so much of Finding No. 3, entitled "What law, or rules, are binding or of force in fixing charges for past shipments," as follows:

(a) That in determining the reasonableness of a charge for transportation service rendered in the past the Court is controlled or limited by the rules or limitations controlling and limiting legislative bodies in prescribing a rate for the future.

As grounds for such objection and exception, petitioner avers the following:

1. That such finding is contrary to the law.

Exception No. 4

Petitioner excepts and objects to Finding No. 3 (d), entitled "What consideration should the Master give to the

act of Congress," and to each and every part of said finding except so much thereof as finds that it is not necessary that intrastate rates on shipments of logs or other commodities be the same as interstate rates to conform to the provisions of the Act of Congress, and as grounds for such exception and objection, says:

1. That said finding is contrary to the law.

2. That the act of Congress referred to is immaterial to the issue here involved.

Exception No. 5

Petitioner objects and excepts to Finding No. 4, entitled "Status of interstate commerce findings before the Master," as follows:

(a) To so much of said finding as holds that the findings of the Interstate Commerce Commission are pertinent in this investigation.

(b) To so much of said finding as holds that "it is proper for the master to consider any and everything appearing in all of the reports and records wherever considered pertinent."

[fol. 612] As grounds for said objections and exceptions petitioner avers the following:

1. That portions of said finding as aforesaid are contrary to law.

Exception No. 6

Petitioner objects and excepts to Finding No. 7, entitled "Estimates of cost of transporting logs in Florida," in the following respects and to the following effect:

(a) That it was or might have been proper for said Railroad Company in the year 1929 to make a charge for the transportation of logs that would yield a return of 4.2% or more.

(b) That it was or might have been proper for said Railroad Company in the year 1930 to make a charge for the transportation of logs that would yield a return of 2.37% or more.

(c) That is was or might have been proper for said Railroad Company in the year 1931 to make a charge for the transportation of logs that would yield a return of 1.57% or more.

(d) That is was or might have been proper for said Railroad Company during any part of the restitution period to make a charge for the transportation of logs that would yield a return of 5.75% or more.

(e) That the Cummer Scale is invalid for any reason.

(f) That the Wilson Lumber Company of Florida is entitled to no more than 34% of the principal amount of its claim with interest as specified in said report.

(g) That the proper charge for the transportation service rendered by the defendant to petitioner during the period involved was a sum equal to the amount exacted and collected less 34% of the difference between that amount and the amount which would have been collected under the Cummer Scale.

As grounds for said objections and exceptions petitioner avers the following:

1. That said finding, as aforesaid, is contrary to law and the evidence.

[fol. 613] Exception No. 7

Petitioner excepts to the failure of the Master to find that the Cummer Scale of rates were the just and reasonable rates upon which to base the charges on petitioner's shipments during the restitution period and to the failure of the Master to award restitution to petitioner in the amount of the difference between the charges collected and the amount that would have been collected had the Cummer Scale of rates been applied to each and every shipment made by petitioner.

Exception No. 8

Petitioner further objects and excepts to said report of the Special Master on the following grounds:

1. The Master erred in over-ruling the several objections of petitioners which the Master did over-rule to the testi-

mony and evidence proferred by the defendant Railroad Company.

2. The Master erred in sustaining the several objections of the defendant Railroad Company which the Master did sustain to the testimony and evidence proferred by the petitioners.

Respectfully submitted, J. V. Norman, Norman, Quirk & Graham, Attorneys for Wilson Lumber Company of Florida.

[fol. 614] IN UNITED STATES DISTRICT COURT

In Equity. No. 511

[Title omitted]

EXCEPTIONS OF PETITIONERS TO THE REPORT OF THE SPECIAL MASTER FILED HEREIN ON NOVEMBER 7, A. D., 1933—Filed November 27, 1933

Come now the petitioners, Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company, jointly and severally, by their respective undersigned solicitors, and object and except jointly and severally to the report of the Honorable Horace M. Holden, Special Master herein, filed in the above entitled cause in the office of the Clerk of the above entitled Court on the 7th day of November, A. D. 1933; each and every objection and exception herein contained shall refer not only to the finding or part thereof to which it is addressed but also to all of the sev-
[fol. 615] eral matters and things set forth in said report in support of or relating to such finding or part thereof.

First Objection and Exception

The petitioners jointly and severally object and except to the following parts of Finding numbered 1, entitled, "Election of Remedies," namely:

(a) So much thereof as reads as follows: "In one of the statements of the counsel for claimants it was stated that they expected to except to the ruling of the Court in the first sentence in the language of the Court quoted above."

And as grounds and particulars for said objection and exception, petitioners aver each of the following grounds severally and distributively:

I. That the portions of said finding as aforesaid may be considered to be ambiguous.

II. That the portions of said finding did not correctly state the legal effect of any statement made by any counsel for any of the claimants. (R. 1 to 4.)

Second Objection and Exception

Petitioners jointly and severally except and object to the following parts of Finding number 2, entitled, "Burden of Proof," viz.,

(a) So much thereof as finds that the collections made under the tariffs which were filed pursuant to the unlawful order of the Interstate Commerce Commission are presumed to have been under proper charges.

(b) So much thereof as finds that the burden is upon the claimants to show that the charges made under said unlawful order were not just and reasonable charges and were extortionate and oppressive.

[fol. 616] (c) To so much thereof as finds that upon the failure of the claimants to show that said charges made under said unlawful order were extortionate and oppressive such claimants would not be entitled to any recovery.

(d) To so much thereof as finds that the burden is upon the claimants to show what would have been a just and reasonable charge before any recovery can be had.

And as grounds and particulars for said objection and exception the Petitioners aver each of the following grounds severally and distributively:

I. That the portions of said finding as aforesaid are contrary to law.

II. That the evidence conclusively shows that the charges exacted by the Railroad Company in the restitution period were exacted solely pursuant to the mandate of and under the unlawful order of the Interstate Commerce Commission, which this Court should have set aside in the first instance (R. 30 of first hearing on first reference).

III. This Court has held that the unlawful order of the Interstate Commerce Commission was void and could give the Atlantic Coast Line Railroad Company "no aid or protection."

IV. The Master has heretofore found and this Court affirmed the finding that the tariffs were filed solely because of the unlawful order of the Interstate Commerce Commission and that the filing of those tariffs was nugatory and of no force and effect at any time.

V. The Master has heretofore found and this Court affirmed the finding that the Railroad Company does not hold possession of the collections made under any color of authority.

[fol. 617] VI. That the portions of said findings as aforesaid are contrary to the order of re-reference made by the Court in this cause, filed January 30th, 1933, and opinion of the Court thereon, wherein restitution was ordered.

Third Objection and Exception

Petitioners jointly and severally except and object to the following parts of finding number 3, entitled, "What Law or Rules are Binding or of Force in Fixing Charges for Past Shipments," viz.:

(a) To so much thereof as finds that in determining what charges should be made for past shipments, every element and factor that should be considered in making rates for future application should likewise be considered.

(b) To so much thereof as finds that the schedule of rates published and filed by the Atlantic Coast Line pursuant to said unlawful order of the Interstate Commerce Commission for future application should be treated as if made at the time of each shipment.

(c) To so much thereof as finds directly or indirectly that a judicial body in determining the reasonableness of a charge for a transportation service rendered in the past is controlled or limited by the rules and limitations controlling and limiting legislative bodies in prescribing a rate for the future.

And as grounds and particulars for said objection and exception the Petitioners aver each of the following grounds severally and distributively:

I. That the portions of said finding as aforesaid are contrary to law.

II. That the portions of said finding as aforesaid are contrary to the evidence.

[fol. 618] III. That the evidence conclusively shows that the charges exacted by the Railroad Company during the restitution period were exacted solely pursuant to the mandate of and under color of the unlawful order of the Interstate Commerce Commission which this Court should have set aside in the first instance (R. 30 of first hearing on first reference).

IV. The Master has heretofore found and this Court affirmed the finding that the tariffs were filed solely because of the unlawful order of the Interstate Commerce Commission and that the filing of those tariffs was nugatory and of no force and effect at any time.

V. A rate prescribed for the future is a legislative act having only prospective operation. The ascertainment of the reasonableness of a charge for a past transportation service is a judicial act in which the issue is the "ancient issue of quantum meruit."

VI. That the portions of said finding as aforesaid are contrary to the order of re-reference made by the Court in this cause, filed January 30th, 1933, and the opinion of the Court thereon.

Fourth Objection and Exception

Petitioners jointly and severally except and object to the following parts of Finding numbered 3 (a), entitled "Unjust Discrimination," viz.:

(a) To so much thereof as finds or infers that unjust discrimination is material in the determination by a judicial [fol. 619] officer of the reasonableness of a charge for a transportation service which has been rendered in the past.

(b) To so much thereof as finds or infers that a charge for a transportation service rendered to Palatka, Lacoo-

chee, or Eastport respectively, is unjustly discriminatory if it is lower than a transportation charge for a service to other destinations under different transportation and traffic circumstances and conditions.

And as grounds and particulars for said objection and exception the Petitioners aver each of the following grounds severally and distributively:

I. That the portions of said finding as aforesaid are contrary to law.

II. Discrimination which is based upon a difference in circumstances and conditions, including cost, volume and regularity of movement and the like, is not unjust, but just.

III. The common law secured to each shipper the right to a reasonable charge for transportation services.

IV. Equality of charge for transportation services rendered under substantially different circumstances and conditions, including costs, volume and regularity, and the like, is not equality, but inequality.

V. A rate prescribed for the future is a legislative act having only prospective operation. The ascertainment of the reasonableness of a charge for a past transportation service is a judicial act in which the issue is the "ancient issue a quantum meruit."

[fol. 620] VI. That the portions of said finding as aforesaid are contrary to the order of re-reference made by the Court in this cause, filed January 30th, 1933, and the opinion of the Court thereon.

Fifth Objection and Exception

Petitioners jointly and severally except and object to each and every part of Finding numbered 3 (d), entitled, "What Consideration Should the Master Give to the Act of Congress", except so much thereof as finds that it is not necessary that intrastate rates on shipment of logs or other commodities be the same as interstate rates to conform to the provisions of the Acts of Congress, and as grounds and particulars of said objection and exception, the Petitioners aver each of the following grounds severally and distributively:

I. That said Finding is contrary to law.

II. That said Finding is inconsistent with Finding numbered 3, sub-paragraph (c), entitled "Act of Congress."

III. The Act of Congress referred to is immaterial to the issue here involved.

IV. The Act of Congress referred to confers no authority to retrospectively fix or establish intrastate rates.

V. A rate prescribed for the future is a legislative act having only prospective operation. The ascertainment of the reasonableness of a charge for a past transportation service is a judicial act in which the issue is the "ancient issue of quantum meruit."

[fol. 621] VI. The defendant Railroad Company had no right in any action taken by it to reply upon anything other than the law as it existed at the time of such action, which law does not and did not include any action by the Court in this cause in accordance with any policy of the Act of Congress referred to in said finding.

Sixth Objection and Exception

Petitioners jointly and severally except and object to so much of Finding numbered 3 (e), entitled, "Should Charges Be Made During Period of Restitution for Trainload Shipments and for Less than Trainload Shipments be Different", as finds or infers that the charge for the transportation of logs from Hines to Palatka, and from Homosassa to Laccoochee, and from Carbur and Perry to Eastport, ought to be the same as the charge for transporting logs from other points of origin to other destinations where the volume, regularity, cost and other circumstances and conditions are different. And Petitioners jointly and severally further except and object to each and every part of said Finding numbered 3 (e), save so much thereof as finds that the cost of transporting logs was less when made in trainload shipments than in single carload shipments, and less when the shipments were less than trainload but substantially above single carloads, and save so much thereof as finds that the intrastate rate in Florida for shipment of logs not over six feet in length is less than for shipments over six feet in length and that the cost of transport-

ing logs over six feet in length is about the same as transporting logs not over six feet in length, or waste wood.
[fol. 622] And as grounds and particulars of said objection and exception the Petitioners aver each of the following grounds severally and distributively:

I. That said Finding is contrary to law.

II. That said Finding is contrary to the directions of the Court in the order of re-reference filed January 30th, 1933, and the opinion of the Court thereon.

III. The question here being a judicial determination of the "ancient issue of quantum meruit" as to the reasonableness of a past transportation charge, discrimination has no part in it.

IV. The Court in its opinion on the order of re-reference in effect requested the views of the Florida Railroad Commission upon the issues here. In a statement filed with the Master at the hearing, that Commission pointed out that a reasonable rate according to the common law standard for the transportation in trainload quantities should be less than the charge for transportation in carload quantities.

V. The fact that the movements from Hines to Palatka, from Homosassa to Lacoochee, and from Perry and Carbur to Eastport were in trainload quantities, is a mere incident to the volume and regularity of the traffic and the low cost of the transportation service rendered. Where the traffic is heavy to a particular destination from one or more points of origin the rule (as distinguished from the exception) is that the transportation charge will be substantially lower to that destination than to other destina-
[fol. 623] tions where the traffic is light. This is true even with respect to rates prescribed for the future. The greater part or nearly all of the tariffs filed by the defendant as well as those filed by the claimants show the rates thereby established to be point-to-point rates. (See exhibits 1A, 3A, 4A, 5A, 6A, 7A, 8A, 9A2 to 9A7, 9A10, 10A, 12A1, 15A, 17A, 18A, 19A, 20A, 21A, 22A, 25A, 26A, 27A, 28A, 31A, 32A, 35A, 36A, 43B, 47B, 48B, 50B, 51B, 53B, 54B, 56B, 57B and 59B.) The Atlantic Coast Line Railroad Company has in effect many point-to-point log rates which are lower than its intrastate scales effective between

other points in the same territory. (See Exhibits 17A and 19A.)

VI. The movements from Hines to Palatka, Homosassa to Lacoochee, and from Perry and Carbur to Eastport were covered by three contracts between the Railroad Company and Wilson Cypress Company, Cummer Cypress Company, and Brooks-Scanlon Corporation respectively, providing not only for the regularity of the movement in trainload quantities but also requiring that the Lumber Companies respectively shall ship all of their outbound lumber over the Atlantic Coast Line Railroad and its connections. The record shows that the average haul of the outbound lumber of Wilson Cypress Company over the lines of the Atlantic Coast Line during the restitution period was 381.6 miles (R. 128-129) (more than three times the length of the log haul), and that the average haul of the outbound lumber of the Cummer Cypress Company over the Atlantic Coast Line Railroad during the restitution period was 307 miles (R. 289) (more than four times the length of the log haul).

[fol. 624] VII. There is no law, common or statutory, ancient or modern, which requires the transportation charge for past serviec between points of origin and destination where the traffic is so heavy as to have moved in trainload quantities on regular schedules to be the same as the transportation charge for past service between points where the volume of movement is light and casual and admittedly at a substantially greater cost per car.

VIII. The weight of the evidence does not warrant the finding that the reasons given for a lower rate on short logs than on long logs is that the short logs might go to waste if the rate were not lower. The position of the Railroad Company of record before the Master was that the short log is one step nearer the manufactured product than the long log and that there is no justification for a difference in rates between the two. (Record, Page 233, on First Reference.)

Seventh Objection and Exception

Petitioners jointly and severally except and object to so much of Finding numbered 4, entitled "Status of Interstate Commerce Findings Before the Master", as finds or infers

that the reports or findings of the Interstate Commerce Commission should be considered in this investigation.

And as grounds and particulars for said objection and exception the petitioners aver:

I. That the portions of said finding as aforesaid are contrary to law.

II. The Master has heretofore found and this Court affirmed the finding that the orders, reports and findings of the Interstate Commerce Commission are not admissible in evidence and are irrelevant and immaterial in this case.

Seventh Objection and Exception

Petitioners jointly and severally except and object to so much of Finding Numbered 8, entitled, "What Should Have Been Charged for Shipment of Logs During Period", as finds or infers,

[fol. 525] (a) That it was or might have been proper for said Railroad Company in the year 1929 to make a charge for the transportation of logs that would yield a return of 4.2% or more.

(b) That it was or might have been proper for said Railroad Company in the year 1930 to make a charge for the transportation of logs that would yield a return of 2.37% or more.

(c) That it was or might have been proper for said Railroad Company in the year 1931 to make a charge for the transportation of logs that would yield a return of 1.57% or more.

(d) That it was or might have been proper for said Railroad Company during any part of the restitution period to make a charge for the transportation of logs that would yield a return of 5.75% or more.

(e) That the Cummer Scale is invalid for any reason.

(f) That Wilson Cypress Company is entitled to no more than 34% of $157,149.41 principal amount, with interest as specified in said report.

(g) That Cummer Cypress Company is entitled to no more than 34% of $48,791.40 principal amount, with interest as specified in said report.

(h) That Brooks-Scanlon Corporation is entitled to no more than 34% of $5,631.34 principal amount, with interest as specified in said report.

(i) That the proper charge for the transportation service rendered by the defendant to Wilson Cypress Company during the period involved was a sum equal to the amount exacted and collected less 34% of the difference between [fol. 626] that amount and the amount which would have been collected under the Cummer Scale.

(j) That the proper charge for the transportation service rendered by the defendant carrier to Cummer Cypress Company during the period involved was a sum equal to the amount exacted and collected less 34% of the difference between that amount and the amount which would have been collected under the Cummer Scale.

(k) That the proper charge for the transportation service rendered by the defendant carrier to Brooks-Scanlon Corporation during the period involved was a sum equal to the amount exacted and collected less 34% of the difference between that amount and the amount which would have been collected under the Cummer Scale.

And as grounds and particulars for said objection and exception the Petitioners aver each of the following grounds severally and distributively:

I. That the portions of said Finding as aforesaid are contrary to law.

II. That the portions of said Finding as aforesaid are contrary to the evidence (Testimony of witnesses, Saunders R. 442 et seq., True R. 193 et seq., Patterson R. 222 et seq., Green R. 247 et seq., Fleishel R. 268 et seq., Lloyd R. 286, et seq., McPherson R. 299 et seq., Baptist R. 345 et seq., Scherer R. 363 et seq., Foley R. 379 et seq., Cummer R. 395 et seq., all of Claimants' Exhibits; and other pertinent testimony.)

III. That the portions of said Finding so excepted to fail to take into account: (a) the character of the commodity; (b) the lading of the cars; (c) the regularity and volume of the movement; (d) the cost of the transportation service; and (e) the fact that under the terms of the service [fol. 627] contracts (Exhibits 86-A, 43-A on re-reference

and Ex. 13 of former proceedings before I. C. C. in record before Supreme Court in this case) between the Railroad Company and the Petitioners respectively, the Petitioners were bound to ship and did ship all of their outbound manufactured product over the lines of the Railroad Company and its connections.

IV. That the portions of said Finding so excepted to are inconsistent with the facts found by the Master with respect to the cost, regularity and volume of the movement from Hines to Palatka.

V. That the portions of said Finding so excepted to are inconsistent with the facts found by the Master with respect to the cost, regularity and volume of the movement from Homosassa to Lacoochee.

VI. That the portions of said Finding so excepted to are inconsistent with the facts found by the Master with respect to the cost, regularity and volume of the movement from Perry and Carbur to Eastport.

VII. The charge found by the Master to be proper for the transportation service rendered during the restitution period from Hines to Palatka, Homosassa to Lacoochee and from Perry and Carbur to Eastport, respectively, is unreasonably high.

VIII. That the finding that the Cummer scale was invalid for any reason was outside the scope of the order of reference.

[fol. 628] Ninth Objection and Exception

Petitioners jointly and severally further object and except to the said report of the Special Master upon the following grounds, severally:

I. Because the Master should have found that a reasonable charge for the transportation of logs from Hines to Palatka during the restitution period was a charge not to substantially exceed 3.2¢ per hundredweight, or $20.48 per car transported during the restitution period.

II. Because the Master should have found that a reasonable charge for the transportation of logs from Homosassa to Lacoochee during the restitution period was a charge

not to substantially exceed 2.3¢ per hundredweight, or $12.44 per car transported during the restitution period.

III. Because the Master should have found that a reasonable charge for the transportation of logs from Perry and Carbur to Eastport during the restitution period was a charge not to substantially exceed 3.7¢ per hundredweight, or $22.10 per car transported during the restitution period.

IV. Because the said report finds and/or infers that in determining the reasonableness of a charge for a transportation service rendered in the past for the transportation of logs during the restitution period to Palatka, Lacoochee and Eastport, respectively, the Master was not permitted to take into account the fact that the movements to those points, respectively, were all or substantially all on regular schedules in trainload quantities resulting in a lower cost and higher revenue than the cost and revenue of movements to other destinations in Florida.

[fol. 629] V. Because of the fact that the movements from Hines to Palatka, Homosassa to Lacoochee and from Perry and Carbur to Eastport respectively moved in trainload quantities is a mere incident to the volume, regularity of the traffic and the low cost of the transportation service rendered during the restitution period, and the fact that such movements were in trainload quantities respectively was no reason for the Master to disregard the volume, regularity and low cost of the movements respectively between said points and the contracts and bonds requiring the shipment of the outbound product, as the Master did do in determining the absolute and relative amount to be restored to the petitioners respectively.

VI. The charge found by the Master to be proper for the transportation service rendered during the restitution period from Hines to Palatka, from Homosassa to Lacoochee and from Perry and Carbur to Eastport, respectively, is unreasonably high.

VII. The Master erred in overruling the several objections of the Petitioners which the Master did overrule to the testimony and/or evidence proffered by the defendant Railroad Company.

VIII. The Master erred in sustaining the several objections of the defendant Railroad Company which the Master did sustain to the testimony and/or evidence proffered by the Petitioners.

Respectfully submitted, H. P. Adair, August G. Gutherin, R. A. Baker, C. G. Ashly, Knight, Adair, Cooper & Osborne, Attorneys for said Petitioners.

[fol. 630] [File endorsement omitted.]

[fol. 631] IN UNITED STATES DISTRICT COURT

No. 514

[Title omitted]

EXCEPTIONS OF THE STATE OF FLORIDA AND FLORIDA RAILROAD COMMISSION TO THE REPORT OF THE SPECIAL MASTER FILED HEREIN ON NOVEMBER 7, A. D. 1933—Filed November 27, 1933

The complainants, State of Florida and Florida Railroad Commission, on behalf of each of the several claimants for whom said complainants filed claims in these restitution proceedings, do object and except to the report of the Special Master filed herein on November 7th, A. D. 1933, in the particulars hereinafter set forth, viz.:

1. That the charges found by the Master to be proper for the transportation service rendered to the said claimants respectively during the restitution period are unreasonably high.

2. The Master should have found that a reasonable charge for the transportation service rendered to said claimants respectively was a charge which in each instance [fol. 632] would result in the recovery by and on behalf of each of said claimants respectively of a sum not substantially less than the amount of overcharge claimed by such claimants respectively.

3. That the Master ought not to have found that the Cummer Scale was invalid for any reason, that question being outside the scope of the order of re-reference.

4. The Master erred in finding that the Federal Interstate Commerce Act as amended was material to the issues here involved.

5. The Master erred in overruling the several objections of the complainants which the Master did overrule to the testimony and/or evidence proffered by the defendant Railroad Company.

6. The Master erred in sustaining the several objections of the defendant Railroad Company which the Master did sustain to the testimony and/or evidence proffered by the Complainants.

Respectfully submitted, T. T. Turnbull, Special Counsel, Florida Railroad Commission; Cary D. Landis, Attorney General of the State of Florida.

[fol. 633] [File endorsement omitted.]

[fol. 634] IN UNITED STATES DISTRICT COURT

Nos. 511, 512, and 514. In Equity

[Title omitted]

MOTION AS TO PLEADINGS—Filed December 29, 1933

To the Honorable the Judges of said Court:

Now comes Atlantic Coast Line Railroad Company, one of the defendants in the above stated causes and respectfully represents unto this Honorable Court as follows:

1. Heretofore on the 29th day of January, 1932, this defendant filed its several answers to the several claims filed by the claimants in these causes. Those answers were received and marked "Exhibit No. 1" and they now appear in the record as exhibits rather than as answers; that is, as evidence rather than as pleadings. It was intended that those documents should be pleadings and they were filed as such.

To such answers the several claimants filed their several objections and replies and their several motions to strike

said answers. They were filed as "Adair Exhibits 1, 2 and 3"; "Norman Exhibit #1"; and "Turnbull Exhibit #1"; and if said answers are filed as pleadings said objections and replies and said motions should be filed as pleadings.

Atlantic Coast Line Railroad Company respectfully moves the court to file the said documents as pleadings; that is, as answers to claimants' several claims.

Respectfully submitted, Alston, Alston, Foster & Moise, of Counsel for Atlantic Coast Line Railroad Company.

July 25, 1933.

[fol. 635] The foregoing motion read and considered.

Same is granted and it is hereby ordered that the documents which are filed as defendant's Exhibit No. 1, which are referred to by the Atlantic Coast Line Railroad Company as its respective answers to the claims of the respective claimants, be, and the same hereby are filed as pleadings. It is further ordered that said objections and replies and motions to strike addressed to said answers be and the same hereby are filed as pleadings.

This 29 day of Dec. 1933.

Sam'l H. Sibley, U. S. C. J.; Wm. H. Barrett, U. S. D. J.; Marvin Underwood, D. J.

We consent to the entry of the above and foregoing order, reserving however, each and every one of the objections and motions addressed to the above mentioned answers which objections and motions are contained in the above mentioned objections and replies and motions.

Cary D. Landis, T. J. Turnbull, J. V. Norman, A. G. Gutheim, R. A. Baker, H. P. Adair, C. G. Ashby, Attorneys for State of Florida, Florida Railroad Commission, Wilson Lumber Co. of Florida, Wilson Cypress Company, Cummer Cypress Company, Brooks Scanlon Corporation.

[fols. 636–1064] [File endorsement omitted.]

[fol. 1065] [File endorsement omitted.]

[fol. 1066] IN UNITED STATES DISTRICT COURT

No. 511. In Equity

[Title omitted]

OBJECTIONS AND REPLY OF BROOKS-SCANLON CORPORATION, TO THE ANSWER OF THE ATLANTIC COAST LINE RAILROAD COMPANY TO THE CLAIM OF THIS COMPLAINANT, AND MOTION TO STRIKE THE SAID ANSWER OF SAID RAILROAD COMPANY—Filed December 29, 1933

Now comes Brooks-Scanlon Corporation, a corporation, and, subject to its motion to strike hereinafter set forth, for a reply to the answer of the Atlantic Coast Line Railroad Company to the claim filed herein by this complainant, avers all and singular the matters heretofore averred in its motion seeking restitution, and in addition thereto avers the following:

[fol. 1067]

I

Replying to Paragraph 1 of said answer and each and every part of said answer respectively, this complainant avers that the amount of its claim, as checked and reconciled with the records of the defendant Atlantic Coast Line Railroad Company (hereinafter sometimes referred to as the defendant carrier) is the sum of $3,622.54, as shown by amended statement of claim hereto attached marked Exhibit "1."

That said sum represents the difference between the aggregate of the sums collected by the defendant carrier from this complainant for the transportation of logs over the lines of the defendant carrier in intrastate commerce in Florida, at the times mentioned in said claim, and the aggregate of the sums which would have been received by the defendant carrier for such transportation had this Court entered in the first instance in this cause the decree which the Supreme Court of the United States has adjudged that this Court should have then entered in this cause.

II

Replying to Paragraph 2 of said answer and to each and every part of said answer, this complainant respectfully

avers that it is the duty of this Court to require the defendant carrier forthwith to restore to this complainant the full amount of said claim. Said claim is measured by the difference between the amount which this complainant was compelled to pay and did pay to the defendant carrier under said invalid and unlawful order of the Interstate Commerce Commission, as aforesaid, and the lawful State rate, viz., the Cummer Scale of rates which the said invalid and unlawful order of said Interstate Commerce Commis-
[fol. 1068] sion purported to supersede. That said sum so collected by and paid to the defendant carrier was collected by virtue and under color of said invalid and unlawful order of the Interstate Commerce Commission, and during the pendency of this proceeding in this Court, and in the Supreme Court of the United States, and as a direct result of the failure of this Court to enter the decree which it should have entered in the first instance instead of the decree which has been reversed by the said Supreme Court of the United States.

(a) That said Cummer Scale of rates was voluntarily filed with the Florida Railroad Commission more than fifteen (15) years since, and was published as required by the laws of the State of Florida and approved and adopted by said Florida Railroad Commission, and long prior to August 2nd, 1928, became and was and still is a part of the schedule of rates for the transportation of freight on the lines of the defendant carrier in intrastate commerce between all points on said lines in Florida, and became and was and ever since has continued to be the lawful State rate for the transportation intrastate in Florida of logs, except walnut, cherry and cedar, and except ash, gum, hickory, oak, pine and cypress logs not over six feet in length. That the purpose of said order of said Interstate Commerce Commission as amended, clarified and supplemented (as appears from the records in this cause) insofar as the same purported to affect intrastate rates in Florida, was to invade the domain of the State of Florida and to supersede by the exercise of Federal Power the lawful scale of State
[fol. 1069] rates which were attacked in said proceeding before said Interstate Commerce Commission, to-wit, the said Cummer Scale of rates. Prior to the time that said order of said Interstate Commerce Commission became effective this complainant, joined by two others, viz., Wilson Cypress

Company and Cummer Cypress Company, filed in this Court their original bill of complaint, wherein and whereby in the manner prescribed by the laws of Congress they averred that for the reasons therein set forth, that said order was unlawful and invalid, and among other things prayed that said order be enjoined, annulled and set aside insofar as the same attempted to affect intrastate rates between points in Florida. Thereafter and prior to January 17th, 1929, such proceedings were had in this Court as that this Court did enter its judgment, decision and decree, wherein and whereby this Court did consider the said order of the Interstate Commerce Commission as said order was then constituted touching intrastate rates and declared that if construed so as to apply to intrastate rates throughout the state said order would probably be invalid and therefore construed the same as being limited to points of origin on the lines of the said defendant carrier in the Northern part of Florida, to-wit, North of and including Jacksonville, Gainesville, Burnett's Lake and High Springs, and based upon such narrow construction (and not otherwise) this Court did sustain the said order of said Interstate Commerce Commission and, to-wit, on January 17th, 1929, did dismiss said bill of complaint.

[fol. 1070] That upon the coming down of the decision and opinion of this Court upon the original hearing the Florida Railroad Commissioners, to-wit, on January 30th, 1929, recognizing the compelling force of said decision and opinion of this Court and the order of the Interstate Commerce Commission thereby sustained so long as the said decision of this Court should remain in force and unreversed, and deeming that deference due to Federal power and the orderly conduct of government required that such recognition appear among the records of said Florida Railroad Commission, did on said date last mentioned enter in its records a certain order numbered 979 wherein and whereby said Florida Commissioners did recognize, in effect, that so long as the said opinion and decision of this Court should remain in force and unreversed, the power of said Florida Commission to enforce said lawful state rates from points of origin on the lines of the defendant carrier within the limited area of North Florida as aforesaid, but not elsewhere in Florida, had been superseded by the compelling force of Federal power. That no shipments from

such points of origin are involved in the claim of this complainant. That under the statute laws of the State of Florida and under the rules and regulations duly adopted by said Florida Commission pursuant thereto, no alteration or increase can be effected in a lawful state rate which has been duly approved and adopted by said Florida Railroad Commission until a public hearing after notice duly given shall have been had, and the consent of said Florida Railroad Commission had consequent to such hearing; that after the coming down of said decision and opinion of this Court upon the original hearing herein and notwithstanding the narrow construction placed upon said order of the Interstate Commerce Commission by the opinion and decision of this Court, and notwithstanding that no application had been made to or hearing had before said Florida Railroad Commission with respect to any increase of said [fol. 1071] rate, the said defendant carrier made to divers shippers threats that on and after February 8th, 1929, under and by virtue of the order of said Interstate Commerce Commission it would apply the rate prescribed by the order of the Interstate Commerce Commission for the transportation of logs in intrastate commerce between all points on its lines in Florida.

That at all times herein mentioned it was and still is the duty of the Florida Railroad Commission under the laws of Florida to enforce in the State courts by injunction or otherwise all intrastate rates which have been prescribed or adopted by said Florida Commission in the manner prescribed by law. That pursuant to such duty the Florida Railroad Commission in the name of the State of Florida and in its own name, to-wit, on January 31st, 1929, did file in the Circuit Court in and for Duval County, Florida, its bill of complaint setting forth the entry of said order of said Interstate Commerce Commission, and the narrow and limited construction placed thereon by this Court in its original decision and opinion, and setting forth the threat of the defendant carrier to apply the rates prescribed by said order of said Interstate Commerce Commission for the transportation of logs between all points in Florida on and after February 8th, 1929, and setting forth at large and in detail the lawful scale of such State rates then and there for more than fifteen years prior thereto and now in force and effect in Florida, and praying that the

defendant carrier be enjoined and restrained from demanding, charging or collecting for the transportation of logs of the tariff descriptions in question more than the lawful State rates between any points in Florida save from [fol. 1072] points of origin situate in that portion of Northern Florida to which this Court had theretofore held the said order of said Interstate Commerce Commission to be applicable and limited; and said State court, after notice and a hearing, did duly issue a temporary injunction enjoining and restraining until the further order of said State court the defendant carrier in accordance with the prayers of said bill from demanding from, charging or collecting for the transportation of logs of the tariff descriptions in question, any rate in excess of a certain scale of rates set forth in detail and at large in said State court order of injunction. And said scale of rates so set forth in said order of injunction is identical in all respects with said lawful State rates then and at all times thereafter and for more than fifteen years prior thereto in force and effect in Florida. Said injunction so issued by said State court at no time has been reversed, dissolved, modified or set aside, and is still pending in said State court. The defendant carrier by petition filed in said State court sought to remove said proceedings from said State court to the United States district Court for the Southern District of Florida, but the State court held that said proceedings were not removeable under the Constitution and laws of the United States and denied said petition for removal.

(b) That after the entry of the order by said State court refusing to allow the removal of said cause to said United States District Court for the Southern District of Florida, and after the issuance of said injunction by said State court, the defendant carrier, to-wit, on February 7th, 1929, did file in the United States District Court for the Southern District of Florida a transcript of the record of said State [fol. 1073] court proceeding and co-incidentally therewith did file in said United States District Court for the Southern District of Florida an ancillary bill purporting to be in aid of the removal of said cause, wherein and whereby the sole relief prayed was for injunctions, temporary and permanent, against the Florida Railroad Commissioners, restraining and enjoining them from proceeding further in said State court in said cause, and restraining them from

enforcing the order of injunction entered by said State court and, that said order of injunction be declared null and void.

That, to-wit, on February 7th, 1929, the said cause came on to be heard before said United States District Court for the Southern District of Florida upon said ancillary bill of complaint so filed by the defendant carrier as aforesaid, and upon motion to dismiss said ancillary bill and upon answer to said ancillary bill filed by said Florida Railroad Commissioners, and upon the motion of the defendant carrier for a temporary restraining order in accordance with the prayers of said ancillary bill. That pending said hearing and after the said last described District Court had announced that a decree would be entered denying the relief prayed in said ancillary bill and dismissing said bill, but before such decree had actually been entered, the said Interstate Commerce Commission did amend its said order dated August 2nd, 1928, with respect to intrastate rates "for the purpose of clarification" by substituting for the words theretofore found to be ambiguous by this Court certain other words, the purpose whereof was to repudiate the construction placed on said order upon the former decision of this Court, and to so word the said order as to [fol. 1074] constitute an attempt to supersede the lawful State rates with the rates prescribed by said order of said Interstate Commerce Commission, "within and throughout the entire State of Florida without exception," notwithstanding that this Court in its former decision and opinion had declared that such an order of said Interstate Commerce Commission would probably be invalid. Thereupon the defendant carrier did file in the said United States District Court for the Southern District of Florida an amendment to its said ancillary bill, wherein and whereby was set up the said "clarifying order" of said Interstate Commerce Commission so entered on February 7th, 1929, as aforesaid, and the said motion to dismiss and the said answer of the Florida Railroad Commissioners were made to stand over to the said ancillary bill as amended. And the said last described District Court upon the authority of the former decision of this Court in this cause did enter its decree dismissing the said ancillary bill of complaint as aforesaid, notwithstanding the entry of the said "clarifying order" of said Interstate Commerce Commission as

aforesaid. That thereafter the defendant carrier applied for and was allowed by said last described District Court an appeal from said decree dismissing said ancillary bill, and thereafter, to-wit, on February 14th, 1929, filed in the United States Circuit Court of Appeals for the Fifth Circuit, its petition for an order in the nature of a supersedeas, restraining the State of Florida and said Railroad Commissioners from enforcing or undertaking to enforce the said order or the order of said State court pending said appeal, and the petition thereon. And thereupon said Circuit Court of Appeals did issue its temporary restraining order pursuant to the prayer of said petition returnable to [fol. 1075] said Circuit Court of Appeals on February 21st, 1929, at which time the said Railroad Commissioners were required to show cause if they could why an injunction should not issue as prayed in said petition. That return was duly made by said Railroad Commissioners to said Circuit Court of Appeals and no injunction was issued, and no further action taken with respect to said temporary restraining order or injunction until, to-wit, March 19th, 1931. That on March 19th, 1931, after the Supreme Court of the United States in and by its opinion, decision and judgment had condemned the said unlawful order of said Interstate Commerce Commission as amended and clarified as aforesaid, as invalid, and had decreed that said order be set aside, the Florida Railroad Commissioners in and by a motion duly filed in said Circuit Court of Appeals did call to the attention of said Circuit Court of Appeals, among other things, the grounds on which said temporary restraining order was sought and that neither on said return day nor thereafter had said Circuit Court of Appeals made further order continuing or dissolving said temporary restraining order theretofore entered therein, notwithstanding that ten days had long since expired since the entry of said temporary restraining order, and did call to the attention of said Circuit Court of Appeals the said opinion, decision and mandate of said Supreme Court of the United States which had adjudged the said order of the Interstate Commerce Commission to be invalid for want of basic and essential findings, and decreed that said order be set aside insofar as the same sought to prescribe intrastate rates. The last described motion came on to be heard [fol. 1076] before said Circuit Court of Appeals, to-wit, on

March 30, 1931, and was argued by counsel and was submitted to the court, and thereupon it was ordered by said Circuit Court of Appeals that the said temporary restraining order be and the same thereby was vacated and dissolved. That said cause in said Circuit Court of Appeals was duly set for argument to be heard on October 5th, 1931, and prior to said day the defendant carrier did file in said Circuit Court of Appeals its motion wherein and whereby it moved said Court that the said appeal in said cause and said cause be dismissed, and among other things averred that the Supreme Court of the United States in and by its opinion and decision in this cause had declared that the said order of the Interstate Commerce Commission as amended as aforesaid was null and void, and that on that account the said cause in said Circuit Court of Appeals had become moot; and in and by said motion the defendant carrier likewise moved said Circuit Court of Appeals to tax all costs in said proceedings against the Florida Railroad Commission upon the asserted ground that said State court was without jurisdiction of the proceedings to which the said bill in said United States District Court for the Southern District of Florida was ancillary, and that had the decision of the Supreme Court of the United States sustained the said order of the Interstate Commerce Commission, as clarified as aforesaid, then that it would have been the duty of the said Circuit Court of Appeals to have reversed the said decree of said United States District Court for the Southern District of Florida which had dismissed the said ancillary bill as amended. That the decree of the said United States District Court for the Southern [fol. 1077] District of Florida from which said appeal had been taken had dismissed the said ancillary bill of complaint as amended, and so it was that at said hearing in said Circuit Court of Appeals the Florida Railroad Commissioners did file their response wherein and whereby they raised no objection to the dismissal of said appeal and of the case, but did object to any costs being taxed against them, and in and by said response averred that said State court did have jurisdiction of the subject matter of the suit so pending in said Court, and that said order of the said Interstate Commerce Commission as amended and clarified as aforesaid was null and void and had been so declared by the said Supreme Court of the United States. And so it

was that afterwards, to-wit, on January 6th, 1932, by order of the said Circuit Court of Appeals the appeal and the case were dismissed and the costs taxed against the defendant carrier.

And this complainant avers that at no time and in no way did the said restraining order of said Circuit Court of Appeals operate or purport to operate to displace the said lawful State rates with the said rate prescribed by said Interstate Commerce Commission or otherwise, or to alter the said lawful State rate or the effectiveness thereof, and this complainant avers on the contrary that said lawful State rates and the said scale of rates set forth in said order of injunction issued by said State court as aforesaid, at all times since February 7th, 1929, and long prior thereto have been and still are the lawful rates for the transportation of logs of the tariff descriptions aforesaid, and that such lawful State rates and none other are the [fol. 1078] rates which were lawfully applicable to the transportation of each and every of the shipments set forth in said claims and the only rates which could lawfully have been applied had this Court entered in the first instance the order which the Supreme Court of the United States has declared this Court should then have entered.

(c) As soon as practicable after the entry by the said Interstate Commerce Commission of its said clarifying order dated February 7th, 1929, this complainant and its said co-complainants, to-wit, on February 21st, 1929, did file in this Court its petition for rehearing setting forth said clarifying order of said Interstate Commerce Commission, and averring that said order of said Interstate Commerce Commission dated August 2nd, 1928, as amended and clarified as aforesaid, was invalid and unlawful, and praying that a rehearing of said cause be had, and this complainant be permitted to file a supplemental bill in the nature of a bill of review in said cause to the end that said order of the Interstate Commerce Commission as amended and clarified as aforesaid be decreed and declared by this Court to be invalid and unlawful, and be by this Court enjoined, annulled and set aside. The said petition for rehearing was granted and leave to file said supplemental bill was granted, and said supplemental bill was filed, and thereafter, to-wit, on March 6th, 1929, this cause

was reheard by this Court. And at such rehearing the defendant carrier was permitted to intervene and did intervene as party defendant in this cause.

That afterwards by its decree dated April 17th, 1929, this Court denied the relief prayed in said bill and supplemental [fol. 1079] bill and refused to enter the order which the Supreme Court of the United States has declared this Court should have entered in the first instance, and sustained said order of the Interstate Commerce Commission as amended and clarified, as aforesaid, and dismissed the said bill and supplemental bill for the reasons stated in the opinion of this Court dated March 22nd, 1929, notwithstanding its decision and opinion dated January 17th, 1929. That upon the coming down of the decision and opinion of this Court upon said rehearing the Florida Railroad Commission, to-wit, on April 20th, 1929, recognizing the compelling force of the decision and opinion of this Court and the order of the Interstate Commerce Commission thereby sustained so long as said order of this Court remained in force and unreversed, and deeming that deference due to Federal power and the orderly conduct of government required that such recognition should appear among the records of said Florida Railroad Commission did on said date last mentioned enter in its records a certain order wherein and whereby, among other things, the said Florida Railroad Commissioners did assert that the said decree of this Court dated April 17th, 1929, sustaining said order of said Interstate Commerce Commission was erroneous and did declare their intention to appeal to the Supreme Court of the United States from said decree of this Court, to the end that the said decree be reversed and the said order of said Interstate Commerce Commission as amended and clarified as aforesaid be enjoined, annulled and set aside insofar as the same purported to affect intrastate rates on logs of the tariff descriptions as aforesaid between points in Florida, and in and by said order said Florida Railroad Commissioners did recognize [fol. 1080] (as they were in duty bound to do) the compelling force of Federal power, even though erroneously exercised, and that the decision of this Court sustaining the said order of said Interstate Commerce Commission was the law of the land until such decree should be modified, set

aside or reversed, and in recognition of the compelling force of such Federal power and not otherwise, the Florida Railroad Commissioners did declare that the said Order No. 979 theretofore entered by said Florida Railroad Commissioners, insofar as the same related to intrastate rates on logs of the tariff descriptions in question and the said State rates on logs were thereby suspended so long as the said last described decree of this Court should remain in force and effect, unmodified and unreversed, or until the further order of said Florida Railroad Commissioners. That said last described order is Order No. 990, referred to in the answer of the defendant carrier to the claim of this complainant as aforesaid, and isolated portions whereof are set forth in said answers.

That under the statute laws of the State of Florida and under the rules and regulations duly adopted by said Florida Railroad Commissioners pursuant thereto, the said Florida Railroad Commissioners were and are without the power to alter said State rates or the schedule of rates of which said State rates were and are a part, as aforesaid, by suspending the existence or effect thereof or otherwise except upon a public hearing duly held by said Florida Railroad Commission after notice duly given to all persons interested and the consent of said Florida Commission con- [fol. 1081] sequent upon such hearing; that no application has ever been made by the defendant carrier or by any other person to the Florida Railroad Commissioners for any alteration or increase in the said lawful State rates; that no notice was given of any hearing and no hearing was had by said Florida Railroad Commissioners of or upon said Order No. 990, or upon or with respect to said State rates, and that said order neither could nor did have any effect to alter, modify or displace or suspend the existence or effect of the said lawful State rate, even if the said order could be so construed as to show a purpose or intent to that end, which this complainant denies. But neither the purpose, intent nor effect of said Order No. 990 was in any wise to alter, modify or displace or to suspend the existence or effect of the lawful State rates which were assailed in said proceedings before said Interstate Commerce Commission, and which are set forth in the said order of injunction of said State court, or in any wise to

recognize that the said order of the Interstate Commerce Commission as amended and clarified as aforesaid was valid or lawful, or to recognize that the decree of this Court which sustained said order of said Interstate Commerce Commission was the right decree which should have been entered by this Court, but on the contrary the purpose, intent and effect of said Order No. 990 was and is a reassertion of the invalidity of the said order of said Interstate Commerce Commission, and that the decree of this Court sustaining such order was erroneous, and a determination to appeal therefrom to the Supreme Court of the United States in order to obtain the relief which the Supreme Court of the United States has now said in this cause [fol. 1082] should have been accorded by this Court in the first instance, and a recognition that pending such appeal and such reversal the Florida Railroad Commission by reason of the exercise of compelling Federal power erroneously exercised could not and should not attempt to enforce the lawful State rates.

Furthermore, this complainant avers that the Supreme Court of the United States by its mandate, opinion and decision in this cause did order, adjudge and decree that said former decree of this Court be and the same was thereby reversed and that the portion of said order of said Interstate Commerce Commission with respect to intrastate rates be set aside; and this complainant avers that the reversal of said former decree of this Court related back to the time when the said former decree of this Court was entered and that within the meaning and intent and effect of said Order No. 990 (as well as for all purposes soever) such reversal took effect as of the time when said former decree of this Court was entered, and as of and from and after said time, the said order No. 990, insofar as the same recognized or declared that the said lawful state rate had been or was superseded or suspended, became and was, according to its own terms, without force or effect.

And this complainant further avers that after the coming down from the Supreme Court of the United States of the mandate in this cause, to-wit, on March 5th, 1931, the Florida Railroad Commission after due notice to the defendant carrier and an opportunity to be heard, did make and enter upon its records a certain order wherein and

[fol. 1083] whereby, among other things, it did declare in effect that the Supreme Court of the United States by its opinion and mandate had reversed said erroneous decree of this Court and had entered the decree which this Court should have in the first instance, and that the defendant carrier at no time had applied to said Florida Commission to alter, increase or modify the lawful State rate, and that said Florida Commission had never approved or considered any alteration, increase or modification thereof, and that said lawful State rates on and at all times since February 8th, 1929, had been and were still in force and effect upon the lines of the defendant carrier in Florida, and applicable between all stations on such lines within and throughout said State without exception, notwithstanding said unlawful and invalid order of said Interstate Commerce Commission, and notwithstanding said erroneous decree of this Court, and that said Florida Railroad Commission at no time and in no way had suffered or permitted the scale of rates prescribed by said order of said Interstate Commerce Commission to be applied by the defendant carrier in intrastate commerce in Florida, or abstained from the enforcement of the application of said lawful State rates in such intrastate commerce, except during the period and to the extent that the said Florida Commission had been compelled to do so by the erroneous decree of this Court; and said Florida Commission in and by said last described order did further declare that in every instance where on or after February 8th, 1929, the defendant carrier had applied the scale of intrastate rates prescribed by said invalid and unlawful order of the Interstate Commerce Commission instead of the said lawful State rates, the defendant carrier to the extent of the difference between [fol. 1084] the amount collected under the former and the amount computed under the latter had overcharged the shippers and/or consignees of such logs, and that such excess charges constituted overcharges within the meaning of the statutes of the State of Florida and the rules of the said Florida Commission.

III, IV, V

Replying to Paragraphs 3, 4 and 5 of said answer, and to each and every part of said answer, this complainant

avers that the authority to determine the reasonableness of the said lawful State rates lies with the State authorities, to-wit, with the Florida Railroad Commission, and that the Supreme Court of the United States in its opinion and decision in this cause so declared. That no application has been made by the defendant carrier or by anyone to the Florida Commission during the fifteen years or more last past in which the said lawful State rates have been in force and effect in Florida seeking the alteration, modification or increase of said lawful state rates or in anywise invoking the power of the Florida Railroad Commission to determine the reasonableness thereof. And this complainant avers that this Court is without jurisdiction to determine the reasonableness or justice of said lawful State rates with respect to the application of said rates in the past as well as with respect to the application of said rates in the future, and such was the effect of the decree of this Court dated July 31st, 1931.

[fol. 1085] And this complainant avers that for, to-wit, two years the defendant carrier enjoyed the fruits of the former decree which was entered by this Court at the instance of the defendant carrier. And the sole remaining jurisdiction and duty of this Court in this cause is to require the defendant carrier to restore to this complainant and its co-complainants the benefits which the defendant carrier has received from it under and by virtue of said decree.

VI

Replying to Paragraph 6 of said answer, and to each and every part of said answer, this complainant avers that on motion of the defendant carrier and of the Georgia Public Service Commission the said Interstate Commerce Commission re-opened its proceedings in its Docket No. 18364, and substantial additional evidence was taken, and said Examiners have formulated and filed a proposed report which they recommend that the Interstate Commerce Commission shall consider and adopt. It is true that the said Examiners in said proposed report found that the rates prescribed for interstate transportation of logs were not unreasonable, but said Examiners likewise found that there existed no interstate movement of logs and probably would be none in the future at the rates prescribed by said Interstate Commerce Commission for application in interstate commerce or at any scale higher than said Cummer

Scale, and recommended that said Interstate Commerce Commission do find that said lawful state rates had not been shown to be unduly prejudicial to Georgia shippers and [fol. 1086] localities engaged in interstate commerce. That in and by the proposed report the said Examiners recommended that the Interstate Commerce Commission do again invade the domain of the State and fix two different scale of intrastate rates, the one scale for application over a route where the movement of logs is substantially heavy, and such scale is substantially lower than the intrastate rate prescribed by the Interstate Commerce Commission in its unlawful and invalid order. The other scale of intrastate rates proposed for application to movements of such logs over other routes in Florida is upon the same level as the scale of rates prescribed by the Interstate Commerce Commission in its former invalid and unlawful order. That this complainant has determined that said proposed report, if adopted, and any order made adopting the same, would be unlawful and invalid, and has determined to except to such report and to contest and oppose the adoption thereof. That said Interstate Commerce Commission has no power or jurisdiction to make in said proceedings any retroactive order affecting said State rates, and said proposed report of said Examiners neither purports nor attempts to adjudge the reasonableness, propriety or legality of any rate which was applied or should be applied to any shipment, the subject matter of said claims or any of them, nor in anywise purports to recommend or to suggest that said Interstate Commerce Commission should or could fix or attempt to fix the level of any rate for the transportation of any shipments save shipments to be made in the future, while the proceedings here at bar are wholly and solely for the restoration by the defendant carrier to this com- [fol. 1087] plainant and its co-complainants of the benefits which the defendant carrier has enjoyed under and by virtue of the erroneous decree heretofore entered by this Court in this cause, and by reason of the failure of this Court to enter in the first instance the decree which the Supreme Court of the United States has now declared that this Court should then have entered.

VII

Further replying to said answer of the defendant carrier, and each and every part of said answer, this complainant

avers that at no time and at no place and in no way has this complainant admitted or recognized that said order of said Interstate Commerce Commission dated August 2nd, 1928, was lawful or valid, or that the decree of this Court whereby said order was sustained was other than erroneous and reversible, but on the contrary this complainant at all times since the entry of said order by said Interstate Commerce Commission and at all times since the entry by this Court of said erroneous decree has asserted that the said order of said Interstate Commerce Commission was unlawful and invalid, null and void, and that the said decisions and decrees of this Court were erroneous, and that this complainant would prosecute with effect to the Supreme Court of the United States in an orderly way its appeal from said erroneous decisions and decrees of this Court to the end that said invalid and unlawful order of the Interstate Commerce Commission should be enjoined, annulled and set aside, and that there be restored to this [fol. 1088] complainant all sums exacted by the defendant carrier under color of said unlawful and invalid order and by virtue of the former decree of this Court in excess of the lawful State rate; and such has been the position taken and maintained by this complainant throughout all proceedings had in this Court and in the Supreme Court of the United States; and such also has been the position taken and maintained by the State of Florida and its officials in every controversy in every forum in which the said order of said Interstate Commerce Commission and/or the said former decisions and decrees of this Court have been brought into question, to-wit, in the said proceedings before the said Interstate Commerce Commission and in this Court, and in said State court, and in said United States District Court for the Southern District of Florida, and in the United States District Court for the Northern Disrict of Florida, and in said United States Circuit Court of Appeals for the Fifth Circuit, and in the Supreme Court of the United States. And the positions taken by the defendant carrier in such proceedings are such as to preclude it from denying the right of this complainant to such restitution.

VII

Further replying to said answer, and each and every part thereof respectively, this complainant avers that all

and singular the matters and things set forth in said answer and in the amended response heretofore filed by the defendant carrier in this proceeding have been determined by the opinion, decision and mandate of the Supreme Court of the United States, and in the proceedings had in said Supreme Court after the rendition of said decision and prior to the coming down of the mandate thereon, and the [fol. 1089] sole remaining jurisdiction and duty of this Court in this proceeding is to restore to this complainant and its co-complainants the benefits which the defendant carrier has enjoyed under and by virtue of the erroneous decree heretofore entered in this cause, and which were collected from this complainant under and by virtue of the said unlawful and invalid order of the Interstate Commerce Commission which was sustained by this Court and by virtue of the failure of this Court to enter in the first instance the decree which the Supreme Court of the United States has declared this Court should then and there have entered.

IX

And further replying to said answer and each and every part and paragraph thereof, this complainant avers that each and every of the matters and things set forth in said answer and each and every part and paragraph thereof is untrue, save those expressly admitted to be true.

X

And this complainant moves the Court to strike and/or dismiss said answer filed by the defendant carrier, and each and every paragraph thereof severally, upon the following grounds, to-wit:

1. That neither the said answer as a whole nor any paragraph thereof states a sufficient cause for the denial or diminution of any of said claims of this complainant or for the delay or denial of this complainant's motion for restitution as amended.

[fol. 1090] 2. That the proceedings heretofore had in this Court and in the Supreme Court of the United States show that all matters and things set forth in said answer, and in the amended response of the defendant carrier are deemed to be and are conclusively determined by the

opinion, decree and mandate of the Supreme Court of the United States, and are not here open to consideration.

3. That said answer and the several parts and paragraphs thereof severally invokes the exercise of administrative power not possessed by this Court.

4. That the Supreme Court of the United States in its opinion and decree in this cause found that the authority to determine the reasonableness per se of said lawful State rates assailed in said proceedings lay with State authority, that is to say, with the Florida Railroad Commission, and it is no where made to appear that any application has ever been made by said defendant carrier or by any one to said State authority to determine the reasonableness of such rates or an alteration thereof.

5. That this Court is without jurisdiction in this cause to consider whether such State rates (so found by the Supreme Court of the United States to have been maintained in intrastate commerce subject to the authority of the State of Florida and to have been published as required by its laws) is compensatory or non-compensatory, confiscatory or non-confiscatory.

[fol. 1091] 6. That it appears from the record in this cause that after the Supreme Court of the United States had rendered its opinion in this cause, but before the coming down of the mandate herein, the defendant carrier asserted in said Supreme Court substantially the same defenses and sought substantially the same relief as the defenses asserted and relief sought in and by the said answer and the said amended response of the defendant carrier, and such relief and defenses of the defendant carrier were overruled and denied by the said Supreme Court of the United States.

7. That said answer and the several parts and paragraphs thereof severally are inapplicable and inappropriate and improper to be filed in this proceeding.

8. It appears that the payment of the sums for which restitution is sought was compelled by the former decree of this Court (so reversed by the Supreme Court of the United States) and not otherwise, and that the opinion and mandate of said Supreme Court require the restitution of such sums all and singular.

9. That the matters and things set up in said answer, and in the several paragraphs thereof respectively, are beyond the scope of the order of reference entered by this Court in this cause on July 31, 1931.

[fol. 1092] Each and every of the foregoing grounds are directed to the answer of the defendant carrier as a whole and are likewise severally directed to each and every paragraph thereof, and to the amended response of the defendant carrier and to each and every paragraph thereof severally.

Baker & Baker, Solicitors and of Counsel for Said Complainant.

[fol. 1093] *Duly sworn to by R. A. Baker. Jurat omitted in printing.*

[fol. 1094]

EXHIBIT 1 TO OBJECTIONS AND REPLY

Atlantic Coast Line Railroad Company

Accounting Department

Office of Auditor Freight Receipts

Claim of Brooks-Scanlon Corporation

Claim as Filed

Sheet No.	Pro. No.	Weight	Rate	As charged amount	Should be amount	Over-charged	Weight	Rate	As charged amount	Should be amount	Over-charged	Remarks
1	12416	1,792,200	3.4	$1,433.76	$609.35	$824.41	1,792,200	3.7	$1,433.76	$663.11	$770.65	Error in rate
2	12417	1,194,800	3.4	955.84	406.23	549.61	1,194,800	3.7	955.84	442.08	513.76	Error in rate
2	12418	1,075,320	3.4	860.25	365.60	494.65	1,075,320	3.7	860.25	397.86	462.89	Error in rate
2	12419	418,180	3.4	334.54	142.18	192.36	418,180	3.7	334.54	154.72	179.82	Error in rate
2	12420 (13150)	1,493,500	3.4	1,194.80	507.79	687.01	1,493,500	3.7	1,194.80	552.59	642.21	Error in rate
2	13999	1,254,540	3.4	1,003.63	426.54	577.09	1,254,540	3.7	1,003.63	464.18	539.45	Error in rate
3	14277 (13343)	1,194,800	3.4	955.84	406.23	549.61	1,194,800	3.7	955.84	442.08	513.76	Error in rate
						$3,874.74					$3,622.54	
						3,622.54						
						$ 252.20	Decrease in overcharge.					

[fols. 1094-a-1119] [Objections and replys, containing same allegations except as to names and amounts, filed by Wilson Cypress Co., Cummer Cypress Co. and Wilson Lumber Co., are omitted in printing.]

[fol. 1120] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 514

[Title omitted]

OBJECTIONS AND REPLY OF THE STATE OF FLORIDA AND FLORIDA RAILROAD COMMISSIONERS TO THE ANSWERS OF THE ATLANTIC COAST LINE RAILROAD COMPANY TO THE CLAIMS FILED BY SAID STATE AND SAID RAILROAD COMMISSIONERS ON BEHALF OF DIVERS CLAIMANTS, AND MOTION OF SAID STATE AND RAILROAD COMMISSIONERS TO STRIKE THE SAID ANSWERS OF SAID RAILROAD COMPANY—Filed Dec. 29, 1933

Now comes the State of Florida and its Railroad Commissioners, and subject to their motion to strike hereinafter set forth, for a reply to the answers of the Atlantic Coast Line Railroad Company to the several claims filed herein by these complainants on behalf of each and every of the claimants listed under Paragraph I hereof, respectively, aver all and singular the matters heretofore averred in their motions seeking restitution, and in addition thereto aver the following:

[fol. 1121]

I

Replying to Paragraph 1 of each and every of said answers and to each and every part of said answers these complainants aver that the names of the claimants on whose behalf these complainants did file claims herein, and the amounts of such claims respectively as checked and reconciled with the records of the defendant Atlantic Coast Line

Railroad Company (hereinafter sometimes referred to as the defendant carrier), are as follows:

Name of claimant	Amount of claim
J. Ray Arnold Cypress Company	$2,944.22
Krusen Land & Timber Company	385.64
Geo. B. Stallings Company	153.06
Dense Pine Lumber Company	53.69
J. W. Jones Lumber Company	918.09
Ben Tillman	54.26
Thompson-Katz Lumber Company	5,225.60
Hessler Hardwood Company	902.01
Hazzard Brothers	459.25
Wilson-Otwell Lumber Corporation	166.30
Eugene Stacey	408.51
F. S. Buffum Company	1,644.16
Gress Manufacturing Company	321.93
Eugene Stacey (additional claim)	117.11
Thompson-Katz Lumber Company (additional claim)	388.91
Putnam Lumber Company	9,981.40
The Everglades Express Company*	4,322.45
Southeastern Hardwood Company	1,016.55
Atlantic Hardwood Company	2,492.91
American Hardwood Corporation (C. B. Benedict, Trustee in Bankruptcy)	3,033.57
Dowling Camp Lumber Company	32.34
Long Leaf Lumber Company	4,384.61
W. C. Hair (operating as Hair Hardwood Company)	467.48
Brown Brothers Company No. 1 (J. B. Adkins, Trustee in Bankruptcy)	425.10
Brown Brothers Company No. 2 (J. B. Adkins, Trustee in Bankruptcy)	86.95
Brown Hardwood Company	93.22
Brown Investment Company	174.40
	$40,653.72

[fol. 1122] The said sums respectively represent the difference between the aggregate of the sums collected by the

* Error—Should be Everglades Cypress Company.

defendant carrier from the respective claimants for the transportation of logs over the lines of the defendant carrier in intrastate commerce in Florida, at the times mentioned in said claims respectively, and the aggregate of the sums which would have been received by the defendant carrier for such transportation had this court entered in the first instance in this cause the decree which the Supreme Court of the United States has adjudged that this Court should have entered in this cause.

[fol. 1123] II

Replying to Paragraph 2 of each and every of said answers, and to each and every part of said answers, these complainants respectfully aver that it is the duty of this Court to require the defendant carrier forthwith to restore to said claimants the full amount of said claims. Said claims respectively are measured by the difference between the amount which the respective claimants were compelled to pay and did pay to the defendant carrier under said invalid and unlawful order of the Interstate Commerce Commission, as aforesaid, and the lawful State rate, viz., the Cummer Scale of rates which the said invalid and unlawful order of said Interstate Commerce Commission purported to supersede. The said sums so collected by and paid to the defendant carrier were collected by virtue and under color of said invalid and unlawful order of the Interstate Commerce Commission, and during the pendency of this proceeding in this Court, and in the Supreme Court of the United States, and as a direct result of the failure of this Court to enter the decree which it should have entered in the first instance instead of the decree which has been reversed by the said Supreme Court of the United States.

[fol. 1124] (a) That said Cummer Scale of rates was voluntarily filed with the Florida Railroad Commission more than fifteen (15) years since, and was published as required by the laws of the State of Florida and approved and adopted by said Florida Railroad Commission, and long prior to August 2nd, 1928, became and was and ever since has continued to be a part of the schedule of rates for the transportation of freight on the lines of the defendant carrier in intrastate commerce between all points on said lines in Florida, and became and was and still is the lawful State rate for the transportation intrastate in Florida of

logs, except walnut, cherry and cedar, and except ash, gum, hickory, oak, pine and cypress logs not over six feet in length. That the purpose of said order of said Interstate Commerce Commission as amended, clarified and supplemented (as appears from the records in this cause) insofar as the same purported to affect intrastate rates in Florida, was to invade the domain of the State of Florida and to supersede by the exercise of Federal power the lawful scale of State rates which were attacked in said proceeding before said Interstate Commerce Commission, to-wit, the said Cummer Scale of rates. Prior to the time that said order of said Interstate Commerce Commission became effective these complainants filed in this Court their original bill of complaint, wherein and whereby in the manner prescribed by the laws of Congress they averred that [fol. 1125] the reasons therein set forth, that said order was unlawful and invalid, and among other things prayed that said order be enjoined, annulled and set aside insofar as the same attempted to affect intrastate rates between points in Florida. Thereafter and prior to January 17th, 1929, such proceedings were had in this Court as that this Court did enter its judgment, decision and decree, wherein and whereby this Court did consider the said order of the Interstate Commerce Commission as said order was then constituted touching intrastate rates and declared that if construed so as to apply to intrastate rates throughout the State said order would probably be invalid and, therefore, construed the same as being limited to points of origin on the lines of the said defendant carrier in the Northern part of Florida, to-wit, north of and including Jacksonville, Gainesville, Burnett's Lake and High Springs, and based upon such narrow construction (and not otherwise) this Court did sustain the said order of said Interstate Commerce Commission and to-wit, on January 17th, 1929, did dismiss the bill of complaint of these complainants.

That upon the coming down of the decision and opinion of this Court upon the original hearing the Florida Railroad Commissioners, to-wit, on January 30th, 1929, recognizing the compelling force of said decision and opinion [fol. 1126] of this Court and the order of the Interstate Commerce Commission thereby sustained so long as the said decision of this Court should remain in force and unreversed, and deeming that deference due to Federal

power and the orderly conduct of government required that such recognition appear among the records of said Florida Railroad Commission, did on said date last mentioned enter in its records a certain order numbered 979 wherein and whereby said Florida Commissioners did recognize in effect, that so long as the said opinion and decision of this Court should remain in force and unreversed, the power of said Florida Commission to enforce said lawful State rates from points of origin on the lines of the defendant carrier within the limited area of North Florida as aforesaid, but not elsewhere in Florida, had been superseded by the compelling force of Federal power. That no shipments from such points of origin are involved in the claims of the shippers and/or consignees on whose behalf these complainants have filed claims. That under the statute laws of the State of Florida and under the rules and regulations duly adopted by said Florida Commission pursuant thereto no alteration or increase can be effected in a lawful State rate which has been duly approved and adopted by said Florida Railroad Commission until a public hearing after notice duly given shall have been had, and the consent of said Florida Railroad Commission had consequent to such hearing; that after the coming down of said decision and opinion of this Court upon the original hearing herein and notwithstanding the narrow construction placed upon said order of the Interstate Commerce [fol. 1127] Commission by the opinion and decision of this Court, and notwithstanding that no application had been made to or hearing had before said Florida Railroad Commission with respect to any increase of said rate, the said defendant carrier made to divers shippers threats that on and after February 8th, 1929, under and by virtue of the order of said Interstate Commerce Commission it would apply the rate prescribed by the order of the Interstate Commerce Commission for the transportation of logs in intrastate commerce between all points on its lines in Florida.

That at all times herein mentioned it was and still is the duty of the Florida Railroad Commission under the laws of Florida to enforce in the State courts by injunction or otherwise all intrastate rates which have been prescribed or adopted by said Florida Commission in the manner prescribed by law. That pursuant to such duty the Florida

Railroad Commission in the name of the State of Florida and in its own name, to-wit, on January 31st, 1929, did file in the Circuit Court in and for Duval County, Florida, its bill of complaint setting forth the entry of said order of said Interstate Commerce Commission, and the narrow and limited construction placed thereon by this Court in its original decision and opinion, and setting forth the threat of the defendant carrier to apply the rates prescribed by said order of said Interstate Commerce Commission for the transportation of logs between all points in Florida on and after February 8th, 1929, and setting forth [fol. 1128] at large and in detail the lawful scale of State rates then and for more than fifteen years prior thereto and now in force and effect in Florida, and praying that the defendant carrier be enjoined and restrained from demanding, charging or collecting for the transportation of logs of the tariff descriptions in question more than the lawful State rates between any points in Florida save from points of origin situate in that portion of Northern Florida to which this Court had theretofore held the said order of said Interstate Commerce Commission to be applicable and limited; and the said state court after notice and a hearing did duly issue a temporary injunction enjoining and restraining until the further order of said state court the defendant carrier in accordance with the prayers of said bill from demanding, from charging or collecting for the transportation of logs of the tariff descriptions in question, any rate in excess of a certain scale of rates set forth in detail and at large in said State court order of injunction. And said scale of rates so set forth in said order of injunction is identical in all respects with said lawful State rates then and at all times thereafter and for more than fifteen years prior thereto in force and effect in Florida. Said injunction so issued by said State court at no time has been reversed, dissolved, modified or set aside, and is still pending in said State court. The defendant carrier by petition filed in said State court sought to remove said proceedings from said State court to the United States District Court for the Southern District of Florida, but the State court held that said proceedings were not re- [fol. 1129] movable under the Constitution and Laws of the United States and denied said petition for removal.

(b) That after the entry of the order by said State court refusing to allow the removal of said cause to said United

States District Court for the Southern District of Florida, and after the issuance of said injunction by said State court, the defendant carier to-wit, on February 7th, 1929, did file in the United States District Court for the Southern District of Florida a transcript of the record of said State court proceedings and co-incidentally therewith did file in said United States District Court for the Southern District of Florida an ancillary bill purporting to be in aid of the removal of said cause, wherein and whereby the sole relief prayed was for injunctions, temporary and permanent, against the Florida Railroad Commissioners, restraining and enjoining them from proceeding further in said State court in said cause, and restraining them from enforcing the order of injunction entered by said State Court, and, that said order of injunction be declared null and void.

That to-wit, on February 7th, 1929, the said cause came on to be heard before said United States District Court for the Southern District of Florida upon said ancillary bill of complaint so filed by the defendant carrier as aforesaid, and upon motion to dismiss said ancillary bill and upon the answer to said ancillary bill filed by said Florida Railroad Commissioners, and upon the motion of the defendant carrier for a temporary restraining order in accordance with the prayers of said ancillary bill. That pending said hear-
[fol. 1130] ing and after the said last described District Court had announced that a decree would be entered denying the relief prayed in said ancillary bill and dismissing said bill, but before such decree had actually been entered, the said Interstate Commerce Commission did amend its said order dated August 2nd, 1928, with respect to intrastate rates "for the purpose of clarification," by substituting for the words theretofore found to be ambiguous by this Court certain other words, the purpose whereof was to repudiate the construction placed on said order upon the former decision of this Court, and to so word the said order as to constitute an attempt to supersede the lawful State rate with the rates prescribed by said order of said Interstate Commerce Commission, "within and throughout the entire State of Florida without exception," notwithstanding that this Court in its former decision and opinion had declared that such an order of said Interstate Commerce Commission would probably be invalid. Thereupon the defendant carrier did file in the said United States District Court

for the Southern District of Florida an amendment to its said ancillary bill, wherein and whereby was set up the said "clarifying order" of said Interstate Commerce Commission so entered on February 7th, 1929, as aforesaid, and the said motion to dismiss and the said answer of the Florida Railroad Commissioners were made to stand over to the said ancillary bill as amended. And the said last described District Court upon the authority of the former decision of this Court in this cause did enter its decree dismissing the said ancillary bill of complaint as aforesaid, notwithstand-
[fol. 1131] ing the entry of the said "clarifying order" of said Interstate Commerce Commission as aforesaid. That thereafter the defendant carrier applied for and was allowed by said last described District Court an appeal from said decree dismissing said ancillary bill; and thereafter, to-wit, on February 14th, 1929, filed in the United States Circuit Court of Appeals for the Fifth Circuit, its petition for an order in the nature of a supersedeas, restraining the State of Florida and said Railroad Commissioners from enforcing or undertaking to enforce the said order or the order of said State court pending said appeal, and the petition thereon. And thereupon said Circuit Court of Appeals did issue its temporary restraining order pursuant to the prayer of said petition returnable to said Circuit Court of Appeals on February 21st, 1929, at which time the said Railroad Commissioners were required to show cause if they could why an injunction should not issue as prayed in said petition. That return was duly made by said Railroad Commissioners to said Circuit Court of Appeals, and no injunction was issued, and no further action taken with respect to said temporary restraining order or injunction until, to-wit, March 19th, 1931. That on March 19, 1931, after the Supreme Court of the United States in and by its opinion, decision and judgment had condemned the said unlawful order of said Interstate Commerce Commission as amended and clarified as aforesaid, as invalid, and had decreed that said order be set aside, the Florida Railroad Commissioners in and by a motion duly filed in said Circuit Court of Appeals did call to the attention of said Court of Appeals among other things the grounds on which said temporary restraining order was sought out; that neither
[fol. 1132] on said return day or thereafter had said Circuit Court of Appeals made further order continuing or

dissolving said temporary restraining order theretofore entered therein, notwithstanding that ten days had long since expired since the entry of said temporary restraining order, and did call to the attention of said Circuit Court of Appeals the said opinion, decision and mandate of said Supreme Court of the United States which had adjudged the said order of the Interstate Commerce Commission to be invalid for want of basic and essential findings, and decreed that said order be set aside insofar as the same sought to prescribe intrastate rates. The last described motion came on to be heard before said Circuit Court of Appeals, to-wit, on March 30th, 1931, and was argued by counsel and was submitted to the Court, and thereupon it was ordered by said Circuit Court of Appeals that the said temporary restraining order be and the same thereby was vacated and dissolved. That said cause in said Circuit Court of Appeals was duly set for argument to be heard on October 5th, 1931, and prior to said day the defendant carrier did file in said Circuit Court of Appeals its motion wherein and whereby it moved said Court that the said appeal in said cause and said cause be dismissed, and among other things averred that the Supreme Court of the United States in and by its opinion and decision in this cause had declared that the said order of the Interstate Commerce Commission as amended as aforesaid was null and void, and that on that account the said cause in said Circuit Court of Appeals had become moot; and in and by said motion the defendant carrier likewise moved said Circuit Court of Appeals to tax [fol. 1133] all costs in said proceedings against the Florida Railroad Commission upon the asserted ground that said State court was without jurisdiction of the proceedings to which the said bill in said United States District Court for the Southern District of Florida was ancillary, and that had the decision of the Supreme Court of the United States sustained the said order of the Interstate Commerce Commission, as clarified as aforesaid, then that it would have been the duty of the said Circuit Court of Appeals to have reversed the said decree of said United States District Court for the Southern District of Florida which had dismissed the said ancillary bill as amended. That the decree of the said United States District Court for the Southern District of Florida from which said appeal had been taken

had dismissed the said ancillary bill of complaint as amended, and so it was that at said hearing in said Circuit Court of Appeals the Florida Railroad Commissioners did file their response wherein and whereby they raised no objection to the dismissal of said appeal and of the case, but did object to any costs being taxed against them, and in and by said response averred that said State court did have jurisdiction of the subject matter of the suit so pending in said court, and that said order of the said Interstate Commerce Commission as amended and clarified as aforesaid was null and void and had been so declared by the said Supreme Court of the United States. And so it was that afterwards, to-wit, on January 6th, 1932, by order of the said Circuit Court of Appeals the appeal and the case were dismissed and the costs taxed against the defendant carrier. [fol. 1134] And these complainants aver that at no time and in no way did the said restraining order of said Circuit Court of Appeals operate or purport to operate to displace the said lawful State rates with the said rate prescribed by said Interstate Commerce Commission or otherwise, or to alter the said lawful State rate or the effectiveness thereof, and these complainants aver on the contrary that said lawful State rates and the said scale of rates set forth in said order of injunction issued by said State court as aforesaid, at all times since February 7th, 1929, and long prior thereto have been and still are the lawful rates for the transportation of logs of the tariff descriptions aforesaid, and that such lawful State rates and none other are the rates which were lawfully applicable to the transportation of each and every of the shipments set forth in said claims and the only rates which could lawfully have been applied had this Court entered in the first instance the order which the Supreme Court of the United States has declared this Court should then have entered.

(c) As soon as practicable after the entry by the said Interstate Commerce Commission of its said clarifying order dated February 7th, 1929; these complainants, to-wit, on February 21st, 1929, did file in this Court their petition for rehearing setting forth said clarifying order of said Interstate Commerce Commission, and averring that said order of said Interstate Commerce Commission dated August 2nd, 1928, as amended and clarified as aforesaid, was invalid and unlawful, and praying that a rehearing of said

[fol. 1135] cause be had, and these complainants be permitted to file a supplemental bill in the nature of a bill of review in said cause to the end that said order of the Interstate Commerce Commission as amended and clarified as aforesaid be decreed and declared by this Court to be invalid and unlawful, and be by this Court enjoined, annulled and set aside. The said petition for rehearing was granted and leave to file said supplemental bill was granted, and said supplemental bill was filed, and thereafter, to-wit, on March 6th, 1929, this cause was reheard by this Court. And at such rehearing the defendant carriers was permitted to intervene and did intervene as party defendant in this cause.

That afterwards by its decree dated April 17th, 1929, this Court denied the relief prayed in said bill and supplemental bill and refused to enter the order which the Supreme Court of the United States has declared this Court should have entered in the first instance, and sustained said order of the Interstate Commerce Commission as amended and clarified, as aforesaid, and dismissed the said bill and supplemental bill for the reasons stated in the opinion of this Court dated March 22nd, 1929, notwithstanding its decision and opinion dated January 17th, 1929. That upon the coming down of the decision and opinion of this Court upon said rehearing the Florida Railroad Commission, to-wit, on April 20th, 1929, recognizing the compelling force of the decision and opinion of this Court and the order of the Interstate Commerce Commission thereby sustained so long as said order of this Court remained unmodified and unreversed, and deeming that deference due to Federal [fol. 1136] power and the orderly conduct of government required that recognition should appear among the records of said Florida Railroad Commission, did on said date last mentioned enter in its records a certain order wherein and whereby among other things the said Florida Railroad Commissioners did assert that the said decree of this Court dated April 17th, 1929, sustaining said order of said Interstate Commerce Commission was erroneous and did declare their intention to appeal to the Supreme Court of the United States from said decree of this Court, to the end that the said decree be reversed and the said order of said Interstate Commerce Commission as amended and clarified as aforesaid be enjoined, annulled and set aside insofar as the same purported to affect intrastate rates on logs of the tariff descriptions as aforesaid between points in Florida,

and in and by said order said Florida Railroad Commissioners did recognize (as they were in duty bound to do) the compelling force of Federal power, even though erroneously exercised, and that the decision of this Court sustaining the said order of said Interstate Commerce Commission was the law of the land until such decree should be modified, set aside or reversed; and in recognition of the compelling force of such Federal power and not otherwise, the Florida Railroad Commisisoners did declare that the said Order No. 979, theretofore entered by said Florida Railroad Commissioners, insofar as the same related to intrastate rates on logs of the tariff descriptions in question and the said State rates on logs were thereby suspended so long as the said last described decree of this Court should remain in force and effect, unmodified and unreversed, or [fol. 1137] until the further order of said Florida Railroad Commissioners. That said last described order is Order No. 990, referred to in the several answers of the defendant carrier to the several claims filed by these complainants as aforesaid, and isolated portions whereof are set forth in said answers.

That under the statute laws of the State of Florida and under the rules and regulations duly adopted by said Florida Railroad Commissioners pursuant thereto, the said Florida Railroad Commissioners were and are without the power to alter said State rates or the schedule of rates of which said State rates were and are a part, as aforesaid, by suspending the existence or effect thereof or otherwise, except upon a public hearing duly held by said Florida Railroad Commission after notice duly given to all persons interested and the consent of said Florida Commission consequent upon such hearing; that no application has ever been made by the defendant carrier or by any other persons to the Florida Railroad Commissioners for any alteration or increase in the said lawful State rates; that no notice was given of any hearing and no hearing was had by said Florida Railroad Commissioners of or upon said Order No. 990, or upon or with respect to said State rates, and that such order neither could or did have any effect to alter, modify or displace or suspend the existence or effect of the said lawful State rate, even if the said order could be so construed as to show a purpose or intent to that end, which these complainants deny. But neither the purpose, intent [fol. 1138] nor effect of said Order No. 990 was in any wise

to alter, modify or displace or to suspend the existence or effect of the lawful State rates which were assailed in said proceedings before said Interstate Commerce Commission, and which are set forth in the said order of injunction of said State court, or in any wise to recognize that the said order of the Interstate Commerce Commission as amended and clarified as aforesaid was valid or lawful, or to recognize that the decree of this Court which sustained said order of said Interstate Commerce Commission was the right decree which should have been entered by this Court, but on the contrary the purpose, intent and effect of said Order No. 990 was and is a re-assertion of the invalidity of the said order of said Interstate Commerce Commission, and that the decree of this Court sustaining such order was erroneous, and a determination to appeal therefrom to the Supreme Court of the United States in order to obtain the relief which the Supreme Court of the United States has now said in this cause should have been accorded to these complainants by this Court in the first instance, and a recognition that pending such appeal and such reversal these complainants by reason of the exercise of compelling Federal power erroneously exercised could not and should not attempt to enforce the lawful State rates.

[fol. 1139] Furthermore, these complainants aver that the Supreme Court of the United States by its mandate, opinion and decision in this cause did order, adjudge and decree that said former decree of this Court be and the same was thereby reversed and that the portion of said order of said Interstate Commerce Commission with respect to intrastate rates be set aside; and these complainants aver that the reversal of said former decree of this Court related back to the time when the said former decree of this Court was entered and that within the meaning and intent and effect of said order Number 990 (as well as for all purposes soever) such reversal took effect as of the time when said former decree of this Court was entered, and as of and from and after said time the said order Number 990, insofar as the same recognized or declared that the said lawful State rate had been or was superseded or suspended, became and was, according to its own terms, without force or effect.

And these complainants further aver that after the coming down from the Supreme Court of the United States of the mandate in this cause, to-wit, on March 5th, 1931, the

Florida Railroad Commission after due notice to the defendant carrier and an opportunity to be heard, did make and enter upon its records a certain order wherein and whereby, among other things, it did declare in effect that the Supreme Court of the United States by its opinion and mandate had reversed said erroneous decree of this Court and had entered the decree which this Court should have entered in the first instance, and that the defendant carrier at no time had applied to said Florida Commission to alter, increase or modify the lawful State rate, and that said [fol. 1140] Florida Commission had never approved or considered any alteration, increase or modification thereof, and that said lawful State rates on and at all times since February 8th, 1929, had been and were still in force and effect upon the lines of the defendant carrier in Florida, and applicable between all stations on such lines within and throughout said State without exception, notwithstanding said unlawful and invalid order of said Interstate Commerce Commission and notwithstanding said erroneous decree of this Court, and that said Florida Railroad Commission at no time and in no way had suffered or permitted the scale of rates prescribed by said order of said Interstate Commerce Commission to be applied by the defendant carrier in intrastate commerce in Florida, or abstained from the enforcement of the application of said lawful State rates in such intrastate commerce, except during the period and to the extent that the said Florida Commission had been compelled to do so by the erroneous decrees of this Court; and said Florida Commission in and by said last described order did further declare that in every instance where on or after February 8th, 1929, the defendant carrier had applied the scale of intrastate rates prescribed by said invalid and unlawful order of the Interstate Commerce Commission instead of the said lawful State rates the defendant carrier to the extent of the difference between the amount collected under the former, and the amount computed under the latter, had overcharged the shippers and/or consignees of such logs, and that such excess charges constituted overcharges within the meaning of the statutes of the State of Florida and the rules of the said Florida Commission.

[fol. 1141] III, IV, V

Replying to Paragraphs 3, 4 and 5 of each and every of said answers, and to each and every part of said answers of the defendant carrier, these complainants aver that the authority to determine the reasonableness of the said lawful State rates lies with the State authorities, to-wit, with the Florida Railroad Commission, and that the Supreme Court of the United States in its opinion and decision in this cause so declared. That no application has been made by the defendant carrier or by anyone, to the Florida Commission during the fifteen years or more last past in which the said lawful State rates have been in force and effect in Florida seeking the alteration, modification or increase of said lawful State rates or in anywise invoking the powers of the Florida Commission to determine the reasonableness thereof. And these complainants aver that this Court is without jurisdiction to determine the reasonableness or justice of said lawful State rates with respect to the application of said rates in the past as well as with respect to the application of said rates in the future, and such was the effect of the decree of this Court dated July 31st, 1931.

And these complainants aver that for, to-wit, two years the defendant carrier enjoyed the fruits of the former decree which was entered by this Court at the instance of the defendant carrier. And the sole remaining jurisdiction and duty of this Court in this cause is to require the defendant carrier to restore to the shippers the benefits which the defendant carrier has received from them under and by virtue of said decree.

[fol. 1142] VI

Replying to Paragraph 6 of said answers and each and every part of said answers respectively, these complainants aver that on motion of the defendant carrier and of the Georgia Public Service Commission the said Interstate Commerce Commission reopened its proceedings in its Docket No. 18364, and substantial additional evidence was taken, and said Examiners have formulated and filed a proposed report which they recommend that the Interstate Commerce Commission shall consider and adopt. It is true that the said Examiners in said proposed report found

that the rates prescribed for interstate transportation of logs were not unreasonable, but said Examiners likewise found that there existed no interstate movement of logs and probably would be none in the future at the rates prescribed by said Interstate Commerce Commission for application in interstate commerce or at any scale higher than said Cummer Scale, and recommended that said Interstate Commerce Commission do find that said lawful state rates had not been shown to be unduly prejudicial to Georga shippers and localities engaged in interstate commerce. That in and by the proposed report the said Examiners recommended that the Interstate Commerce Commission do again invade the domain of the State and fix two different scales of intrastate rates, the one scale for application over a route where the movement of logs is substantially heavy, and such scale is substantially lower than the intrastate rate prescribed by the Interstate Commerce Commission in its unlawful and invalid order. The other scale of intrastate rates proposed for application to [fol. 1143] movements of such logs over other routes in Florida is upon the same level as the scale of rates prescribed by the Interstate Commerce Commission in its former invalid and unlawful order. That these complainants have determined that said proposed report if adopted will constitute an unlawful invasion of the domain of the State of Florida, and that such report and any order made adopting the same would be unlawful and invalid, and have determined to except to such report and to contest and oppose the adoption thereof. That said Interstate Commerce Commission has no power or jurisdiction to make in said proceedings any retroactive order affecting said State rates, and said proposed report of said Examiners neither purports nor attempts to adjudge the reasonableness, propriety or legality of any rate which was applied or should be applied to any shipment the subject matter of said claims or any of them, nor in anywise purports to recommend or to suggest that said Interstate Commerce Commission should or could fix or attempt to fix the level of any rate for the transportation of any shipments save shipments to be made in the future, while the proceedings here at bar are wholly and solely for the restoration by the defendant carrier to the said shippers of the benefits which the defendant carrier has enjoyed under

and by virtue of the erroneous decree heretofore entered by this Court in this cause, and by reason of the failure of this Court to enter in the first instance the decree which the Supreme Court of the United States has no- declared that this Court should then have entered.

[fol. 1144]

VII

Further replying to said answers of the defendant carrier and each and every of said answers, and each and every part of them, respectively, these complainants aver that at no time and at no place and in no way have these complainants admitted or recognized that said order of said Interstate Commerce Commission dated August 2nd, 1928, was lawful or valid, or that the decree of this Court whereby said order was sustained was other than erroneous and reversible, but on the contrary these complainants at all times since the entry of said order by said Interstate Commerce Commission and at all times since the entry by this Court of said erroneous decree have asserted that the said order of said Interstate Commerce Commission was unlawful and invalid, null and void, and that the said decisions and decrees of this Court were erroneous, and that these complainants would prosecute with effect to the Supreme Court of the United States in an orderly way their appeal from said erroneous decisions and decrees of this Court to the end that said invalid and unlawful order of the Interstate Commerce Commission should be enjoined, annulled and set aside, and that there be restored to the Florida shippers all sums exacted by the defendant carrier under color of said unlawful and invalid order and by virtue of the former decree of this Court in excess of the lawful State rate; and such has [fol. 1145] been the position taken and maintained by these complainants in every controversy in every forum in which the said order of said Interstate Commerce Commission and/or the said erroneous decisions and decrees of this Court have been brought into question, to-wit, in the said proceedings before the said Interstate Commerce Commission and in this Court, and in said State court, and in said United States District Court for the Southern District of Florida, and in the United States District Court for the Northern District of Florida, and in said United States Circuit Court of Appeals for the Fifth Circuit, and in the

Supreme Court of the United States. And the positions taken by the defendant carrier in such proceedings are such as to preclude it from denying the right of such shippers to such restitution.

[fol. 1146] VIII

Further replying to said answers, and each and every of the same and each and every part thereof, these complainants aver that all and singular the matters and things set forth in said answers and in the amended response heretofore filed by the defendant carrier in this proceeding have been determined by the opinion, decision and mandate of the Supreme Court of the United States, and in the proceedings had in said Supreme Court after the rendition of said decision and prior to the coming down of the mandate thereon, and the sole remaining jurisdiction and duty of this Court in this proceeding is to restore to said shippers and claimants respectively the benefits which the defendant carrier has enjoyed under and by virtue of the erroneous decree heretofore entered in this cause, and which were collected from said shippers under and by virtue of the said unlawful and invalid order of the Interstate Commerce Commission which was sustained by this Court and by virtue of the failure of this Court to enter in the first instance the decree which the Supreme Court of the United States has declared this Court should then and there have entered.

[fol. 1147] IX

And further replying to said answers and each and every of such answers, and each and every part and paragraph thereof, these complainants aver that each and every of the matters and things set forth in said answers each and every and each and every part and paragraph thereof are untrue, save those expressly admitted to be true.

X

And these complainants move the Court to strike and/or dismiss each and every of said answers filed by the defendant carrier, and each and every paragraph thereof severally, upon the following grounds, to-wit:

1. That neither the said answers as a whole nor any paragraph thereof state a sufficient cause for the denial or

diminution of any of said claims or for the delay or denial of these complainants' motion for restitution as amended.

2. That the proceedings heretofore had in this Court and in the Supreme Court of the United States show that all matters and things set forth in said answers, each and [fol. 1148] every, and in the amended response of the defendant carrier are deemed to be and are conclusively determined by the opinion, decree and mandate of the Supreme Court of the United States, and are not here open to consideration.

3. That said answers, each and every, and the several parts and paragraphs thereof severally invoke the exercise of administrative power not possessed by this Court.

4. That the Supreme Court of the United States in its opinion and decree in this cause found that the authority to determine the reasonableness per se of said lawful State rates assailed in said proceedings lay with State authority, that is to say, with the Florida Railroad Commission, and it is nowhere made to appear that any application has ever been made by said defendant carrier or by any one to said State authority to determine the reasonableness of such rates or an alteration thereof.

5. That this Court is without jurisdiction in this cause to consider whether such state rate (so found by the Supreme Court of the United States to have been maintained in intrastate commerce subject to the authority of the State of Florida and to have been published as required by its laws) is compensatory or non-compensatory, confiscatory or non-confiscatory.

[fol. 1149] 6. That it appears from the record in this cause that after the Supreme Court of the United States had rendered its opinion in this cause, but before the coming down of the mandate herein, the defendant carrier asserted in said Supreme Court substantially the same defenses and sought substantially the same relief as the defenses asserted and relief sought in and by the said answers and the said amended response of the defendant carrier, and such relief and defenses of the defendant carrier were overruled and denied by the said Supreme Court of the United States.

7. That said answers, each and every, and the several parts and paragraphs thereof severally are inapplicable and inappropriate and improper to be filed in this proceeding.

8. It appears that the payment of the sums for which restitution is sought was compelled by the former decree of this Court (so reversed by the Supreme Court of the United States) and not otherwise, and that the opinion and mandate of said Supreme Court require the restitution of such sums all and singular.

[fol. 1150] 9. That the matters and things set up in said answers and in the several paragraphs thereof, respectively, are beyond the scope of the order of reference entered by this Court in this cause on July 31st, 1931.

Each and every of the foregoing grounds are directed to each and every of the answers of the defendant carrier as a whole and are likewise severally directed to each and every paragraph thereof, and to the amended response of the defendant carrier and to each and every paragraph thereof severally.

Cary D. Landis, Attorney General of the State of Florida. Theo. T. Turnbull, of counsel for said Florida Railroad Commissioners.

[fol. 1151] *Duly sworn to by Theo. T. Turnbull. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 1152] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

No. 511

BROOKS-SCANLON CORPORATION ET AL.

versus

THE UNITED STATES OF AMERICA ET AL.

No. 512

WILSON LUMBER COMPANY OF FLORIDA

versus

THE UNITED STATES OF AMERICA ET AL.

No. 514

STATE OF FLORIDA ET AL.

versus

THE UNITED STATES OF AMERICA ET AL.

OPINION OF COURT ON EXCEPTIONS—Filed Jan. 26, 1934

The above stated consolidated case came on for hearing upon exceptions by all parties to the second report of the master. The exceptions which relate to the admission of evidence do not set forth the evidence referred to, but require the Court to search the very voluminous record to find it. We overrule these exceptions because of this failure, and because so far as we can identify the evidence referred to its appears while of great bulk to be of little if any weight and importance. Many exceptions relate to matters or mere recital or argument in the report rather than to findings of ultimate fact or conclusions of law, and we overrule such for immateriality. The exceptions which have real substance are dealt with adversely in what we now express as our conclusions and findings. We do not [fol. 1153] agree with all that is said in the report, but we do affirm its important positions and the result reached.

Conclusions of Law

When simple restitution was blocked by the finding under the first reference to the master that the Cummer scale was after its withdrawal as a voluntary rate not a lawful established rate because unremunerative and confiscatory, one member of this court was of opinion that restitution could not be accomplished and that the court should deny it. The majority held that inasmuch as all parties were before the court and much time had already been taken and much expense incurred in investigating the matter, that it ought under the circumstances to be brought to a conclusion, and they ordered a further prosecution of it not as a simple restitution of a status with no adjudication of rights but as a final ascertainment of the true account between the Railroad Company and each shipper before the court. The question is now raised whether the claimants of restitution by going forward under the conditions then imposed on the re-reference did or did not waive all con-

tention as to the applicability of the Cummer scale, or, to put it otherwise, whether the re-reference could proceed without a formal renunciation of that contention. One of the two judges who concurred in the re-reference is of opinion that the condition meant only that a result should be reached on full hearing of the merits of the claims, and should so adjudicate them that there should be no suits on them before other tribunals, but that there might be a full review of all rulings made in regard to the Cummer scale [fol. 1154] or otherwise. The other concurring judge is of opinion that an abandonment of the Cummer scale as a measure of the restitution was also required. His thought is not that the right of appeal from the decision of this court that the Cummer scale is void should be denied claimants, but that restitution being not an absolute right but granted ex gratia, the affixing of a precedent condition to the grant of the right of ascertaining what, if any, restitution is recoverable based upon compensation for service on the basis of quantum meruit, that there should be an abandonment of the right claimed of recovery on the Cummer scale, as such, is fair and equitable. In view of this disagreement we cannot decide the point. But it is immaterial in this court, since all three judges concur in the opinion that the Cummer scale is not available to measure restitution because it is confiscatory and void as an enforced rate.

The original burden of proof was upon the claimants of restitution. When they showed what they had paid, and that it was in excess of the Cummer scale, the apparent state rate, the burden shifted to the Railroad Company, which assailed the Cummer scale and overturned it as an obligatory rate. Under the conditions of the re-reference the burden then returned to the claimants to show what should in right and justice be restored to them, the case standing much as though they were suing in a court of law for overcharges. But the placing of the burden of proof is of no great practical importance because an abundance of evidence was offered by both sides, and the master's decision and our own goes on the evidence produced and not on the failure of either party to produce proof.

In establishing the fair and reasonable charge to be made for these past shipments the master rightly held that statutes, both state and federal, which control the making of future intrastate rates should be regarded. The common

law standards of charges by common carriers when legislative rates have not been prescribed are modified by such statutes. Since, for instance, the Florida law prohibits discrimination by common carriers, discrimination ought to be avoided not only in fixing future rates but as far as practicable in measuring compensation for past services. The prohibition of federal law aimed at discrimination by [fol. 1155] state rates against interstate commerce is not easily applicable to such a case as this, because the existence thereof involves questions so technical and complex as not to be well examinable in a court trial and is referred by the statutes specially to the Interstate Commerce Commission; but the fact that such discrimination is prohibited is a matter that should have some bearing on the present problem. Nevertheless we agree with the master that the decision of the Interstate Commerce Commission on July 5th, 1932, that the Cummer scale resulted in discrimination against interstate commerce as respects the carrier's revenues and that for the future a state rate conforming to the interstate rates on logs be applied has no retroactive effect and does not constrain a finding that in 1929 and 1930 the interstate rates were the only just and reasonable charge in this intrastate traffic. The prior findings of the Interstate Commerce Commission in 1928 which resulted in no valid order had no legal effect and can be given only such weight and persuasiveness as their reasoning carries with it. There is, of course, no rigid necessity for intrastate rates to conform with interstate rates. They frequently do not conform, and where there is divergence it becomes a question which are the more just and reasonable.

The cost of the service is important but not conclusive in fixing a future rate or a past just charge. A common carrier cannot be required to serve at a loss, but when the point of remunerativeness is reached there follows a zone of reasonableness in which the value of the service to the patron, the volume and regularity of the traffic, the history of the charge and the extent to which it has been relied on by the public in making investments and establishing businesses, and other elements, may all have an important [fol. 1156] bearing.

Common carriage both at common law and under legislative rates is a business rather than a succession of individual contracts. There ought to be customary and established

charges for similar transportation looking to average costs and profits in the differentiated classes of traffic rather than in particular transactions. For instance the fact that the carrier had misfortunes or the reverse on some particular trip ought not to affect the charges for that trip. The chances of such accidents are to be absorbed in the customary or the prescribed charges. Even as between classes of service that might logically be differentiated, sometimes considerations of policy prevent it. In the present case it appears that trainload shipments of logs can be handled more cheaply than single carloads. But the Florida Commission refused to permit the Cummer scale to be filed as a trainload rate. The Interstate Commerce Commission did not establish any trainload rates on logs either in interstate commerce or in prescribing an intrastate rate in 1932, although it was well aware of the difference in the cost of handling, but it fixed rates only for carloads. It is uniformly considered to be impolitic to afford a special rate to patrons of railroads who can ship in trainloads to the disadvantage of those who can ship only in carloads. During the restitution period here involved neither shippers nor carriers had any reason to suppose that trainload shippers would be given a rate different from proper carload rates. The master rightly concluded that a reasonable charge for carload shipments ought to be applied to all, but to be fixed in view of the fact that much of the traffic did move in trainloads at a reduced cost and was great in volume and regular in recurrence.

While in fixing a reasonable charge for past transactions [fol. 1157] the same considerations are in general present, as when a future rate is to be prescribed, there is a difference. In fixing a future rate, the effect of the rate on future traffic may be looked to, shippers and carriers being in a measure able to adjust their operations to the rate and the shippers may govern their prices and the extent of their shipments accordingly. When, as in this case, there has been a conflict between a state prescribed and a federal prescribed rate, the shippers relying on the former and the carrier on the latter, and both rates have turned out to be invalid, it is too late for either to do the things that might otherwise have been done. The Court in fixing a fair charge has no occasion to consider the future, but taking all the past circumstances into consideration is to deter-

mine what is just and reasonable. There was in fact no interstate commerce in logs, so that discrimination against interstate commerce as to persons and places need not be regarded. Discrimination as respects the revenues of the carrier, while a most important question in fixing permanent future rates, can hardly be investigated or considered in a privte litigation between carrier and shipper regarding a past shipment. On the other hand, the fact that the state rate relied on by the shippers during all this period was one originally named by the carrier and voluntarily maintained by it for many years while the shippers were making their investments and establishing their businesses upon the faith of it is deserving of great weight in considering the fairness as between carrier and shipper of suddenly demanding more than double that rate.

It will be remembered that the order of the Interstate Commerce Commission which authorized the increase was resisted successfully and was annulled. The master's re- [fol. 1158] port shows that he gave attention to all the important elements proper to be considered, and while it is not so specific as it might be in its subordinate conclusions of fact nor as to how he arrived at the precise scale of reasonable charges which he fixed, yet his conclusion does not appear to be baseless or arbitrary, but reasonable and fair.

Findings of Fact

The testimony as to the cost of hauling the logs satisfies us that the master's findings of a reasonable charge affords compensation to the carrier. It may be that trainloads might have been carried profitably at a less rate, but the traffic as a whole could not be carried for much less. Whether compensation should not be more liberal gives us the most concern. In view of the experience of the Interstate Commerce Commission and its full and repeated consideration of these very rates, we should have inclined to think the rates which they fixed, first for interstate traffic and then for intrastate traffic on logs, ought to be accepted as the fair charge. Against this, however, is the thought that they were not dealing with past tranasctions but attempting to fix a future rate to which carriers and shippers

ought to conform themselves, and the fact is strong that the low rates were voluntarily established and maintained over a long period by the carrier, and on the faith of them these claimants had made investments and established businesses which would be and were very disastrously affected by a sudden and drastic raising of rates. While the carrier was not bound to continue the low rates at a loss, and could demand compensatory rates, a just and reasonable regard to the entire situation makes against a sudden increase of more than one hundred per [fol. 1159] cent. on a traffic in which freight costs are a large part of the value of the product shipped. If the ideal rates be those fixed by the Commission, the ideal might with reason and justice have been approached less precipitately. The just compensation as fixed by the master, applicable of course only to these past transactions, affords reimbursement for all fair elements of cost and a fair profit. His figure approximates the intrastate rates on logs in Georgia and North Carolina, and is some lower than that in Alabama and South Carolina. We think the master's conclusion is just and we affirm it.

We therefore overrule all exceptions of all parties to the report, and direct that a decree be prepared upon the basis of the conclusions of law and findings of fact under the original and supplemental reports.

January 22nd, 1934.

Saml. H. Sibley, Circuit Judge. Wm. H. Barrett, U. S. District Judge.

I respectfully dissent.

E. Marvin Underwood, U. S. District Judge.

[fol. 1160] [File endorsement omitted.]

[fol. 1161] IN UNITED STATES DISTRICT COURT

In Equity. No. 511

In Equity. No. 512

In Equity. No. 514

[Title omitted]

MOTION OF ATLANTIC COAST LINE RAILROAD COMPANY FOR MODIFICATION OF OPINION—Filed March 30, 1934

Comes now Atlantic Coast Line Railroad Company, defendant, before the entry of the decree in the above styled causes and objecting to the form of order and decree submitted by claimants, move the court to modify the opinion filed in said cause on January 26, 1934, and for grounds thereof shows as follows:

Modification of Opinion

1. The opinion states on page one thereof:

"The exceptions which relate to the admission of evidence do not set forth the evidence referred to, but require the court to search the very voluminous record to find it. We overrule these exceptions because of this failure, and because so far as we can identify the evidence referred to it appears while of great bulk to be of little if any weight and importance."

[fol. 1162] Movant shows that the admission of the very evidence objected to, which objections were the basis of exception numbered nine, made necessary the very voluminous record before the court. Had the objectionable evidence of claimants been excluded, the remaining relevant evidence would be small. At the outset of the hearing before the Master, movant objected to the type of edivence offered by claimants, which objections were repeated and considered by the Master as made to the greater part of the evidence offered by the claimants. (See record pages 58, 60, 63, 85, 87.) The Master reserved his decision and forced this movant to meet this type of evidence. This

so broadened the scope of the reference that to set forth in an exception the evidence objected to would have required a volume of exceptions almost as large as the record itself.

Movant further shows that the rule as to the formal requirements of exceptions to a report of a master were complied with. Movant's exception numbered nine, at page 99, sets forth that the testimony of the witness True was objected to. The court was referred to specified pages of the record which set forth the evidence and the objections thereto. The testimony of the witnesses Fleishell, McPherson, Foley, Cummer, and Green was in each instance referred to by specific pages of the record made before the Master.

Exception numbered nine also specified various tariffs and exhibits analyzing those tariffs and gave the number of each document introduced in evidence and gave the page [fol. 1163] number where they were introduced and testimony offered in connection therewith. Movant's objections to each type of evidence was also stated in the record at the pages specified.

Movant shows that this exception numbered nine should be sustained and in so doing the court would strike the greater part of the evidence in this record.

Movant prays that leave be granted it to amend this exception as to form only if this court is still of the opinion that it is not possible to consider the merit of the exception for that reason.

Movant shows that the court overruled this exception because the evidence "appears while of great bulk to be of little if any weight and importance." If this be the ground for overruling this exception it would seem that the evidence should be stricken from the record for the named reason.

2. The court's opinion under the heading: "Conclusions of Law," after stating the basis of the first exception of movant and further setting up the fact that one of the presiding judges dissented and the remaining two judges disagreed as to its validity, goes on to state:

"In view of this disagreement we cannot decide the point. But it is immaterial in this court, since all three judges concur in the opinion that the Cummer scale is not

available to measure restitution because it is confiscatory and void as an enforced rate."

The last paragraph of the court's opinion is as follows:

"We therefore overrule all exceptions of all parties to the report, and direct that a decree be prepared upon the basis of the conclusions of law and findings of fact under the original and supplemental reports."

[fol. 1164] Movant shows that the opinion should be modified in this respect to the extent that the opinion is contradictory as to the ruling of the court on movant's exception numbered one.

3. The court's opinion directs that a decree be prepared upon the basis of the conclusions of law and findings of fact under the original and supplemental reports of the Master. Movant shows that the Master found, at pages 37 and 38 of his second report, that claimants were entitled to interest on the "overcharges." The finding is as follows:

"The amount of overcharge on each shipment made by the claimants respectively shall bear interest at the rate of eight per cent. per annum from date of each shipment."

Movant shows that the court's opinion should be modified in this respect because not even claimants are asking that interest from *from* date of shipment but rather from the date of the payment of freight bills by the claimants.

Movant shows that interest is not a lawful item of claimants' recovery. This is an equitable cause commenced to establish an amount of money claimed to have been paid through the erroneous decision of this court. A specified sum was sought to be recovered, arrived at by deducting from the amount of freight actually charged and paid the amount which would have been paid had the Cummer scale of rates been applicable. Movant at all times and here and now denies that any sum of money was due claimants. Movant attacked the Cummer scale as an unlawful measure of restitution. This court held the Cummer scale to be unlawful and confiscatory. Necessarily the amount of money claimed was unliquidated and the first issue to be decided [fol. 1165] by this court was what should be a reasonable

charge for transporting the commodity involved during the period involved. Necessarily the amount to be awarded claimants was unliquidated until this measure was determined. Movant further shows that interest, if allowed, should run from the date of the filing of the Master's second report.

4. Movant further shows that the record in this cause as it now stands does not justify a decree in accordance with the opinion filed in this cause January 26, 1934.

Movant shows that due to the diversity of opinion expressed by the judges constituting this court, it has not had a trial as provided by the Act of Congress in such cases made and provided, towit, The Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219, 28 U. S. C. A. 47.

Objections to Form of Decree

1. Movant objects to the form of order on the motion suggesting the change in the personnel of the Florida Railroad Commission, submitted by claimants in the three constituent cases, in that paragraphs 2 and 3 and 4 thereof, have no place in said order.

2. Movant shows that the three constituent causes were consolidated for trial and hearing and that they should now be consolidated into one proceeding and only one final decree entered therein. Movant prays that an order of consolidation be entered for this purpose.

[fol. 1166] 3. Movant objects to the form of final decree of restitution submitted by claimants in each of the constituent causes in that

(a) Movant alleges that only one final decree should be entered in the cause as consolidated;

(b) Movant shows that said final decrees do not describe the order of the Interstate Commerce Commission involved in said causes; do not refer in any way to the reports of the special master made therein; nor the opinion of this court filed January 26, 1934.

(c) Movant objects to paragraph one of each of the forms of final decree of restitution submitted by claimants in that the allowance of interest is unlawful and unwarranted and no date is stated in said form of decree from which said interest commences to run.

(d) Movant further objects to the language of the proposed decrees in paragraph 1 thereof, as follows:

* * * which the court finds and hereby finds to have been lost by the claimants, * * *

in that the recovery of claimants is not a restoring of money lost by them but an award of damages caused by the court in its failure to set aside the order of the Interstate Commerce Commission in the first instance. The recovery is not a liquidated sum such as is recoverable in an action at law for an overcharge.

(e) Movant objects to paragraph 2 of each of the forms of final decree of restitution submitted by the claimants in that it provides for a lump sum recovery with interest at six per cent. per annum from January 26, 1934, the date [fol. 1167] of the filing of this court's opinion in this cause. The allowance of this provision in the decrees permits the claimants to recover interest on interest. The date of the filing of the opinion in this cause is immaterial and has no bearing on the computation of interest, if any should be recoverable.

Wherefore, movant prays that this its motion be allowed and ordered filed and that the same be set for hearing before the court constituted as directed by the Acts of Congress in such cases made and provided.

Carl H. Davis, W. E. Kay, Robert C. Alston, Attorneys for Atlantic Coast Line Railroad Company, Movant. Alston, Alston, Foster & Moise, of Counsel.

March 30th, 1934.

[fol. 1168] The foregoing motion read and considered. Let the same be filed. Movant is directed to serve a copy of the same on counsel of record in these causes by mailing a copy of the motion and this order to them at their post office addresses.

This 30 day of March, 1934.

E. Marvin Underwood, Judge, United States District Court.

[fols. 1169–1187] [File endorsement omitted.]

[fol. 1188] IN UNITED STATES DISTRICT COURT

In Equity. No. 511

In Equity. No. 512

In Equity. No. 514

[Title omitted]

AMENDMENT TO MOTION OF ATLANTIC COAST LINE RAILROAD COMPANY FOR MODIFICATION OF OPINION—Filed April 14, 1934

Now comes Atlantic Coast Line Railroad Company, defendant in the above numbered and styled causes which have been consolidated for the purpose of trial, and with leave of the court first had, and before the entry of a decree in the above styled causes, amends its motion to modify the opinion of this court in said causes filed on January 26, 1934, and for amendment says:

[fol. 1189] I

Atlantic Coast Line Railroad Company respectfully prays leave to add a new paragraph to said original motion to be numbered 5 under the heading in said original motion entitled "Modification of Opinion," as follows:

5. Movant shows that after the Honorable the United States Supreme Court rendered its opinion and order in the case of State of Florida et al. vs. United States et al., January 5, 1931, reported in 282 U. S. 194, this movant moved the Interstate Commerce Commission to reopen said proceedings before it to the end that it might take evidence and make further findings contemplated in said opinion of the Supreme Court.

That cause was reopened by the Commission, extensive hearings were had, and the Interstate Commerce Commission made additional findings of fact and reaffirmed its previous finding that the interstate rates which it had originally prescribed in its order dated August 2, 1928, were reasonable and just (186 I. C. C. 157). The said rates had been in effect unquestioned since February 8, 1929, and have remained in effect ever since. It further found that the intra-

state rates, the Cummer scale, discriminated against interstate commerce and such discrimination might be removed by applying a scale of rates not less than those prescribed for interstate transportation of logs.

In a proceeding brought by the claimants to set aside the said second order of July 5, 1932, (186 I. C. C. 157) of the Interstate Commerce Commission, this court on the 24th day of February, 1933, declined to enjoin the Interstate Commission's order, holding in effect that the Interstate Com- [fol. 1190] mission's order was such as the court themselves would have made (4 Fed. Sup. 477). An appeal was taken from the said order to the Supreme Court of the United States and that court on the 2nd day of April, 1934, affirmed the order of this court entered on February 24, 1933. A copy of said opinion of April 2, 1934, of the United States Supreme Court is hereto attached and made a part hereof.

The rates which were prescribed by the Interstate Commerce Commission in its order of July 5, 1932, and which were sustained by this court and in turn sustained by the United States Supreme Court were the same rates for the transportation of logs intrastate in Florida over the Atlantic Coast Line Railroad Company for distances up to 170 miles, as were charged during the period beginning February 8, 1929, and ending in March, 1931, and upon which charges claims for restitution are based. The said opinion of the Supreme Court holds that "the Commission made comprehensive findings to supply what had been found to be lacking" in its first report (August 2, 1928, 146 I. C. C. 717). It then refers to the fact that the Commission "in considering the effect of the Cummer scale of rates (intrastate scale in Florida) on interstate commerce * * * was aided by evidence of actual operations during the period from February 8, 1929, to January 31, 1931, when the increased intrastate rates prescribed by the former order were *in effect*" (italics added). The court quotes the language from the summary of the Commission dealing with the cars that moved during the aforementioned period—1929-1931.

[fol. 1191] Movant respectfully alleges that the reopened proceeding before the Interstate Commission was a continuance of the first proceeding and that the action of the Supreme Court is, in fact, a finding that the application of the rates fixed by the Interstate Commerce Commission in both of its orders and in use during the period beginning

February 8, 1929, and continuing until March, 1931, was necessary in order to remove unjust discrimination against interstate commerce.

The Supreme Court's decision upholds the Commission's findings that the Cummer scale of rates worked unjust discrimination against interstate commerce and that in order to remove that unjust discrimination it was necessary that rates not less than the interstate scale of rates be used. The scale of interstate rates fixed by the Commission remained in effect during all the time involved and the intrastate rates in Florida during the period involved were brought up to that standard. The Commission had held that this increase in the intrastate rates was necessary to remove the unjust discrimination against interstate commerce. The Court treats the higher intrastate rates fixed by the Interstate Commerce Commission as being "in effect" during the restitution period (February 9, 1929-March, 1931).

The Supreme Court of the United States in its opinion dated January 5, 1931 (282 U. S. 194) did not find that the Interstate Commission could not have made "the basic or [fol. 1192] "essential findings" required to support its order of August 2, 1928. It did find that the Commission had not made those basic or essential findings, and said:

"In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported." (282 U. S. 215.)

Emphasizing this statement, the court continues its opinion at page 215:

"If the facts as to intrastate transportation of logs in Florida are such as to justify an order as to intrastate rates in order to end an unjust discrimination as against interstate commerce either as between persons and localities, or because of an undue burden upon the revenues of the carrier, the Interstate Commerce Commission is still at liberty, acting in accordance with the authority conferred by the statute, to make such determinations as the situation may require."

The motion to reopen the proceedings before the Interstate Commission, which motion was granted, was made in pursuance of the aforementioned statement by the Supreme Court. The Commission took further evidence and made additional findings. Among those findings was a statement of the gross revenues received by the Atlantic Coast Line for intrastate transportation of logs over its lines in Florida for all, or nearly all, the period for which restitution is claimed, and a showing of the difference between the reward which it received under the rates which the Interstate Commission had fixed as being the minimum rates necessary to be charged to avoid unjust discrimination against interstate commerce, and the reward which it would have received had the Florida intrastate scale of rates (Cummer scale) been in effect.

[fol. 1193] The Commission's first order (August 2, 1928, 146 I. C. C. 717) was not in a subject beyond its jurisdiction. It was clearly one over which the Interstate Commission had controlling jurisdiction. In its continued exercise of that jurisdiction of this subject matter it again made the ultimate finding that the Florida intrastate scale of rates (Cummer scale) unjustly discriminated against interstate commerce and that it was necessary for the Atlantic Coast Line to charge the rates which had been fixed by the Commission in its original report and order dated August 2, 1928. This court found that the ultimate finding of the Commission in its second report and order (July 5, 1932, 186 I. C. C. 157) was supported by intermediate findings and in turn those intermediate findings were amply sustained by adequate evidence.

The Commission thus finds that there was no reason for requiring on July 5, 1932 (the date of its second order), rates which were less or different from those required in its first order.

The cause was again reopened by the Commission on motion of the claimants for the purpose of receiving evidence as to certain rates which had been put into operation by certain other roads and which had the effect of working a reduction in those rates. The Commission examined that evidence and on January 9, 1933 (190 I. C. C. 588), reaffirmed its findings of August 2, 1928 and July 5, 1932.

On supplemental bills this court re-examined the case, made the findings referred to and declined to enjoin the rates which the Commission had ordered into effect.

[fol. 1194] In its last opinion entered on April 2, 1934, copy of which is hereto attached, the United States Supreme Court emphasized the fact that the Interstate Commerce Commission is the fact-finding body *that* and that "It is not the province of the courts to substitute their judgment for that of the Commission." The court specifically applies this rule to causes undertaking to remove unjust discrimination against interstate commerce, saying:

"That purpose unquestionably extended to the prohibited discrimination produced by intrastate rates. In relation to such a discrimination, as in other matters, when the Commission exercises its authority upon due hearing, as prescribed, and without error in the application of rules of law, its findings of fact supported by substantial evidence are not subject to review."

That court specifically agreed

"with the conclusion of the District Court that there was no lack of substantial evidence to support the Commission's findings."

The record holds no justification for the determination by the Master that rates less than those fixed by the Commission and upheld by the United States Supreme Court were sufficient to prevent unjust discrimination against interstate commerce, during the period beginning February 8, 1929 and ending in March, 1931.

The case was tried by the claimants before the Master on the basis that discrimination against interstate commerce was not an element for decision. There is no evidence in the record, and there was no pretense of putting any into the record, to sustain the findings of the Master to the effect that rates less than those prescribed by the Commission would be sufficient to remove the unjust discrimination against interstate commerce. The Master's findings are in conflict with the rulings of the Supreme Court of the United States.

[fol. 1195] It is respectfully submitted that if a decree is entered in this cause allowing restitution to the claimants it will, in effect, break down and nullify the purposes and conclusions reached by the Supreme Court of the United States in its aforementioned opinion in this cause of April 2, 1934, for that:

(1) The original order of the Commission was not entered in a proceeding out of its jurisdiction but in one, as we have pointed out, in which the Commission had supreme jurisdiction.

(2) The Supreme Court did not find in that case that the record would not have sustained the findings of the Commission. It simply found that there were not sufficient intermediate findings by the Commission to sustain its ultimate finding.

(3) The Supreme Court specifically held that the Commission "was still at liberty," acting under the statutes to make "such determinations as the situation may require."

(4) The mandate from the Supreme Court in this cause directed this court as follows:

"You, therefore, are hereby commanded that such further proceedings be had in such cause, in conformity with the opinion and decree of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding."

(5) The claims for restitution in this cause are made under that provision of said mandate. The use as a basis for restitution of a different scale of rates from that which the Commission has found to be the minimum necessary to prevent unjust discrimination against interstate commerce, [fol. 1196] is contrary to the spirit and purpose of the Interstate Commerce Act, and breaks down the force and effect of the decision of the Supreme Court which emphasizes that findings of the Commission on such matters, when supported by substantial evidence are not to be reviewed by the courts.

II

Movant respectfully prays leave to add a new paragraph to said original motion, to be numbered 6, as follows:

6. Movant respectfully alleges that the opinion of the Supreme Court of the United States in this controversy should control the decision of the Master and of this court in the particular matter now before this court. The Supreme Court holds that the Interstate Commerce Commission has authority by virtue of Section 13 (4) of the Inter-

state Commerce Act to prescribe the scale of intrastate rates to be applied in Florida in the transportation of logs [fol. 1197] for distances now exceeding 170 miles on movant's railroad. The Supreme Court further states that the purpose of Congress

"unquestionably extended to the prohibited discrimination produced by intrastate rates. In relation to such discrimination, as in other matters, when the Commission exercises its authority upon due hearing, as prescribed, and without error in the application of rules of law, *its findings of fact supported by substantial evidence are not subject to review. It is not the province of the courts to substitute their judgment for that of the Commission.*" (Italics added.)

Movant respectfully alleges that the rate established by the Interstate Commerce Commission for application during the restitution period is more than prima facie, the reasonable and lawful rate for the period involved, and it is not for the Master or this court to substitute their judgment for that of the Commission. The same record that was before the Interstate Commerce Commission in the hearings which resulted in the first order of the Commission of August 2 (146 I. C. C. 717), 1928, was before the Master and is now before this court. The evidence that was before the Commission in the hearings which resulted in its reports and orders of July 5, 1932 (186 I. C. C. 157) and January 9, 1933 (190 I. C. C. 588) included the evidence which was before the Commission in the hearing resulting in its first report and was otherwise very much the same as that offered before the Master in the hearings on the claims for restitution.

The second order of the Commission (July 5, 1932) was made during a time when economic conditions were even more severe against the railroads than those existing in the period from February 8, 1929, to January 31, 1931, and if the rates prescribed by the Commission as reasonable in 1932 are upheld, a fortiori, a reasonable rate for a period prior to that date, 1929-1931, should be a higher rate, rather than a lower one as the Master found in this cause.

[fol. 1198] III

Movant respectfully prays leave to add a new paragraph to said original motion, to be numbered 7, as follows:

7. Movant shows that when the first decision of the Supreme Court in this controversy, Florida et al. vs. United States et al., 282 U. S. 194, was entered, claimants, on the coming down of the mandate to this court, moved that restitution be granted for the period February 8, 1929, to January 31, 1931, during which time the Interstate Commerce Commission's scale of rates had been in effect, the amount claimed being the difference between that scale of rates and the Florida intrastate scale (Cummer scale) of rates. When the Supreme Court entered its opinion and order in said first cause, and before the judgment of the Supreme Court had been entered in this court, movant applied to the Interstate Commerce Commission to reopen the cause, which motion was granted, and the Commission's order of July 5, 1932, resulted. From January 31, 1931, to February 25, 1933, the Florida intrastate scale (Cummer scale) of rates was put into effect on the lines of the Atlantic Coast Line Railroad Company and many shipments by claimants were made on said Florida intrastate scale of rates during that period. At the time said rates were put into effect movant gave notice to all shippers, including claimants, that if and when the true rates for transporting logs over its lines in Florida for distances not exceeding 170 miles were determined, it would demand of each shipper [fol. 1199] the difference between the rate paid and the lawful rate. Movant respectfully alleges that complainants in this cause are indebted to it in large sums of money by reason of said facts. By reason of these facts, movant respectfully alleges that this court should exercise its full and complete jurisdiction in the premises, settling and determining fully the claims and accounts between all parties of record in this cause as to all matters arising out of this rate controversy which has existed from February 8, 1929, up to and including February 25, 1933.

By reason of these facts, movant respectfully alleges that this court should settle the claims and accounts between the parties as to all matters arising out of the rate controversy which has existed. This being an equitable controversy should be concluded by adjustment of the claims and accounts existing between movant and the various shippers of logs, parties to this cause, and the Florida Railroad Commission, representing other shippers of logs.

Movant respectfully alleges that this can be done only on the basis of the rate prescribed by the Interstate Commerce Commission and approved and affirmed by the Supreme Court of the United States in its opinion hereto attached.

IV

Movant respectfully prays leave to add a new paragraph to said original motion, to be numbered 8, as follows:

8. Movant respectfully alleges that this court should withdraw its entire opinion heretofore filed in this cause and reconsider this matter in the light of the opinion rendered by the United States Supreme Court on April 2, 1934, and enter a decree that complainants are not entitled to recover from the Atlantic Coast Line Railroad Company any sum [fol. 1200] by way of restitution and that movants do recover from complainants the amount of undercharges representing the difference between the rates paid by complainants for the shipment of logs and the true and lawful rates as prescribed by the Interstate Commerce Commission for the entire period of the controversy.

Wherefore, movant prays that this its amendment be allowed and ordered filed and that a hearing be had on its motion as amended before this court, constituted as required by the Acts of Congress in such cases made and provided.

Carl H. Davis, W. E. Kay, Robert C. Alston, W. Hart Sibley, Attorneys for Atlantic Coast Line Railroad Company. Alston, Alston, Foster & Moise, of Counsel.

The above and foregoing amendment having been presented to me, it is allowed and ordered filed. Let a copy of the amendment and this order be mailed to counsel of record.

This 14 day of April, 1934.

E. Marvin Underwood, United States District Judge.

[fol. 1201] (Copy)

EXHIBIT NO. 1 TO AMENDMENT TO MOTION

SUPREME COURT OF THE UNITED STATES

October Term, 1933

No. 342

STATE OF FLORIDA, EUGENE S. MATTHEWS, MAMIE EATON-GREENE, and W. B. DOUGLASS, etc., et al., Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GEORGIA PUBLIC SERVICE COMMISSION, and ATLANTIC COAST LINE RAILROAD COMPANY

Appeal from the District Court of the United States for the Northern District of Georgia.

(April 2, 1934)

Mr. Chief Justice HUGHES delivered the opinion of the Court:

This appeal presents the question of the validity of an order made by the Interstate Commerce Commission on July 5, 1932, requiring the Atlantic Coast Line Railroad Company to desist from an unjust discrimination found to exist in the relation of intrastate and interstate rates and to maintain certain rates for the intrastate transportation of logs, as described, within and throughout the State of Florida for distances of 170 miles or less. 186 I. C. C. 157; 190 I. C. C. 588. The order was sustained by the District Court, three judges sitting. 4 F. Supp. 477.

By an order of August 2, 1928, the Commission prescribed interstate rates on logs on the lines of the Atlantic Coast Line Railroad Company from points in northern Florida to destinations in Georgia for distances not exceeding 170 miles. Finding that the Florida intrastate rates on similar logs for similar hauls, generally described as the Cummer scale, resulted in unjust discrimination,

the Commission also established rates for intrastate application within Florida which would correspond with the rates fixed for interstate transportation. 146 I. C. C. 717. The order in the latter respect was assailed and the decree of the District Court sustaining it was reversed by this Court. Florida v. United States, 282 U. S. 194. We decided that the order could not be upheld on the ground of [fol. 1202] undue prejudice against persons and localities in interstate commerce, and that it could not be sustained on the ground of unjust discrimination against interstate commerce from the standpoint of revenue losses due to intrastate rates as the order in that aspect was not supported by appropriate findings.

Meanwhile, in February, 1929, both the interstate rates and intrastate rates, as prescribed, had been put into effect. After the mandate of this Court, the Cummer scale of intrastate rates was restored and became effective on April 10, 1931. The Interstate Commerce Commission reopened the proceedings and, after hearing, found that the Cummer scale of intrastate rates caused unjust discrimination against interstate commerce from a revenue standpoint. The Commission made no finding with respect to undue prejudice against persons and localities in interstate commerce. The Commission accordingly entered the order of July 5, 1932, now under review. While bills were pending in the District Court to enjoin this order, the Commission granted a further hearing in view of the representation that a number of southern railroads had reduced their log rates, and on January 9, 1933, the Commission made an additional report which affirmed the findings previously made and restored the order of July 5, 1932, to be effective February 25, 1933. 190 I. C. C., p. 600. Supplemental bills were filed in the District Court, and on February 24, 1933, the decree was entered upholding the Commission's action.

The order of the Commission is attacked upon the grounds (1) that under Emergency Railroad Transportation Act, 1933 (c. 91, 48 Stat. 211), the Commission was without power to make the order; (2) that the findings of the Commission are inadequate to sustain the order; and (3) that if the findings can be deemed to be adequate, they are not supported by the evidence.

First. The power of the Commission. Transportation Act, 1920 (41 Stat. 484), the Congress granted specific

[fol. 1203] authority to the Commission to remove discriminations against interstate commerce caused by intrastate rates. The Congress amended Section 13 of the Act to Regulate Commerce so as to empower the Commission to confer with state authorities "with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission." Sec. 13 (3) And, whenever in the course of its authorized investigations, the Commission, after full hearing, finds that any rate, regulation, or practice "made or imposed by authority of any State" causes "any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce," the Commission is required to prescribe the rate thereafter to be charged, or the regulation or practice thereafter to be observed, in such manner as in its judgment will remove the discrimination. The order of the Commission is to bind the carriers, parties to the proceeding, "the law of any State or the decision or order of any State authority to the contrary notwithstanding." (Sec. 13 (4).)

In Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U. S. 563, 585-587, we reached the conclusion that the provision of Section 13 (4) for the removal of "any undue, unreasonable, or unjust discrimination against interstate commerce" was not to be regarded as referring only to discrimination as between persons and localities. We held that Transportation Act, 1920, imposed an affirmative duty on the Commission "to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States." Intrastate rates, we said, must play a most important part in maintaining such an adequate system. If there was interference with the achievement of that purpose because of a disparity of intrastate rates as compared with interstate rates, the Commission was authorized to end that disparity. It was to be ended because it constituted an "unjust discrimination against interstate commerce." [fol. 1204] We concluded that these words in Section 13 (4) were not tautological, but had the necessary effect of conferring authority upon the Commission to raise intra-

state rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intrastate. United States v. Louisiana, 290 U. S. 70, 75.

Appellants insist that this result was reached because of what was described as the "dovetail relation" between Section 13 (4) and Section 15a, and that the amendment of the latter section by Emergency Railroad Transportation Act, 1933, has effected a radical change. They contend that the Commission no longer has authority to remove an unjust discrimination against interstate commerce caused by a disparity of intrastate rates viewed from a revenue standpoint. We are unable to accept that view. Section 13 (4) was not amended by Emergency Railroad Transportation Act, 1933. The authority conferred by Section 13 (4) to prescribe intrastate rates for the purpose of removing an unjust discrimination against interstate commerce was not withdrawn. The Congress had knowledge of the construction given to Section 13 (4) by this Court and of the important effect of that construction in relation to intrastate rates found to be inadequate. The conclusion is not lightly to be reached that the Congress would have undertaken to change a policy of such great importance without explicit language indicating that purpose.

The purpose of the changes in Section 15a is not left in doubt. They were made with the manifest object of eliminating the provisions for the recapture of excess income of carriers and of revising the rule as to rate making.[1] The requirement imposed by Transportation Act, 1920, for the adjustment of rates according to rate groups was abolished and in substitution the Commission was directed to give due consideration to the factors which are specified in the section as amended.[2] Thus the Commission is to consider,

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[1] See report of the Committee on Interstate and Foreign Commerce of the House of Representatives, H. R. No. 193, 73rd Cong., 1st sess., pp. 28-30.

[2] Section 15a in its amended form is as follows:

"Section 15a (1). When used in this section, the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

among other factors, the effect of rates on the movement of traffic"; "the need, in the public interest, of adequate [fol. 1205] and efficient railway transportation service at the lowest cost consistent with the furnishing of such service"; and "the need of revenues sufficient to enable the car- [fol. 1206] riers, under honest, economical, and efficient management, to provide such service."[3]

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service."

[3] As to the substituted rule of rate making, the House Committee said in its report: "The rule of rate making as rewritten in the proposed paragraph (2), found in section 205 of the bill, directed the Commission to give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service. It is difficult to conceive of a reasonable rate which would ignore any one of these considerations. The Commission as a fair and impartial body acting for the Congress will continue to give consideration to these factors. In the case of the power given to the Commission to prescribe just and reasonable rates the committee does not believe that it is necessary to encumber the statutes with further language which might be mandatory in terms but which could add nothing further to the plain duty of the Commission under the law, and which might be interpreted to imply a distrust of the Commission in prescribing just and reasonable rates. The Commission will and must give consideration to all facts developed on the record and see to it that the record is enlightening as to such factors as are mentioned in the first section of this bill." H. R. No. 193, 73rd Cong., 1st sess., p. 30.

Neither the elimination of the group method of rate making, nor the substituted rule, suggests an intention to impair the Commission's authority over intrastate rates for the appropriate protection of interstate commerce. On the contrary, the substituted rule of rate making by its express terms emphasizes the carriers' need of adequate revenues. The Congress had provided authority to meet that need where inadequate intrastate rates caused unjust discrimination against interstate commerce. The Commission had exercised that authority. The Commission had not proposed the diminution of that authority. The new Act discloses no intention to weaken national control for essential national purposes over the railway system of the country. It was rather designed to aid that control in the light of the depressed economic condition of the railways. We conclude that the new rule of rate making left the power of the Commission under Section 13 (4) intact.

Second. The Commission's findings. On the former appeal we pointed out that if the action of the Commission was not simply for the removal of undue prejudice against interstate commerce as between persons or localities, and the Commission undertook to prescribe a statewide level of intrastate rates in order to avoid an undue burden, from [fol. 1207] a revenue standpoint, upon the interstate carrier, there should be appropriate findings upon evidence to support an order directed to that end. We observed that in dealing with unjust discrimination as between persons and localities the question was one of the relation of rates to each other; but that in considering the authority of the Commission to enter the state field and to change a scale of intrastate rates in the interest of the carrier's revenue, the question was that of the relation of rates to income. But to support the order then under review, the Commission had made no findings as to the revenue which had been derived by the carrier from the traffic in question, or which could reasonably be expected under the increased rates, or that the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an adequate transportation service. Florida v. United States, supra, pp. 212, 214, 215.

On the new hearing, the Commission made comprehensive findings to supply what had thus been found to be lacking. The findings set forth at length transportation conditions, traffic and revenues. 186 I. C. C., pp. 160-189. Appellants' criticisms proceed upon an unwarranted assumption. The requirement of essential findings as to revenues did not demand an impracticable exactness. Losses through inadequate rates could be shown satisfactorily even though proof of the precise extent of such losses was not available. Reasonable determinations were required and these were made.

Reviewing the history of the Cummer scale of intrastate rates on logs, and considering comparable interstate and intrastate rates, the Commission found that the Cummer scale was abnormally low and less than reasonably compensatory; that the defendants' revenue under the Cummer scale was "insufficient under all the circumstances and conditions to cover the full cost of the service." Id., pp. 165, 187. The Commission was able to go further. In considering the effect of the Cummer scale upon interstate commerce, the Commission was aided by evidence of actual operations during the period from February 8, 1929, to [fol. 1208] January 31, 1931, when the increased intrastate rates prescribed by the former order were in effect. The Commission, in its summary, found (Id., pp. 188, 189):

"The record shows that during the period of approximately two years following the increase in the rates the total movement amounted to 18,602 cars, This total included 3,740 cars transported to Eastport, Lacoochee, and Otter Creek in trainload movements that have ceased and will not be resumed. Under normal economic conditions it seems probable that the annual volume of the Florida log movement under rates the same as those previously prescribed will not be less than the average of this 2-year period minus the number of cars included in the discontinued trainload movements. This average is 7,431 cars. That the movement will not be less than this under normal conditions is confirmed by the fact during the five months immediately preceding the last hearing in this case, February to June, 1931, when conditions were abnormal, there were shipped over defendant's lines in Florida a total of 2,765 cars of logs. This movement was at the rate of 6,636

cars a year. We believe that the movement of logs intrastate in Florida over defendant's lines will not be materially curtailed under the rates which we here prescribe, which are the same or substantially the same as the rates generally in effect and under which logs freely move throughout the South.

"The freight charges collected on the 18,602 cars above referred to aggregated $571,508.94, and if the Cummer scale had applied the charges would have been $281,225.75. The freight charges collected on the 3,740 cars referred to were $100,439.06, and if the Cummer scale had applied they would have been $48,286.75. On the 14,862 cars remaining [fol. 1209] after deducting the 3,740 cars from the total movement of 18,602, the freight charges collected were $471,069.88 ($571,508.94 minus $100,439.06) and if the Cummer scale had been applicable they would have been $232,939 ($281,225.75 minus $48,286.75) or $238,130.88 less than those actually collected. Accordingly, on the basis of an average of 7,431 cars a year under normal economic conditions, which basis we believe conservative, the gross revenues under the rates prescribed by the previous order herein would be more than $100,000 a year greater than under the Cummer scale, now in effect. The application of the Cummer scale, therefore, places a substantial burden upon defendant's interstate revenues. If the revenues yielded by the Cummer scale are not sufficient to cover the cost of the service, as the cost evidence indicates, it would follow that part of the above-stated amount would constitute a dead loss in net revenue.

"We find that the circumstances and conditions surrounding the transportation of these logs intrastate in Florida are not on the whole as favorable as the circumstances and conditions surrounding the interstate movement of logs over defendant's lines. * * *

"We further find that the intrastate rates on logs over 6 feet in length, except walnut, cherry, and cedar, applicable between points on the Atlantic Coast Line in Florida for distances of 170 miles and less are, and for the future will be, unjustly discriminatory against interstate commerce, and that such unjust discrimination can be and should be removed by the establishment between all points on the Atlantic Coast Line in Florida for distances of 170 miles or less of rates not less than the rates shown for such

distances in Appendix F hereto, which are the rates found reasonable for interstate application from northern Florida to Georgia."

On the second rehearing, with respect to changes made by southern rail carriers in their log rates—which appeared to have been made largely for the purpose of meeting truck competition—the Commission found that in Florida the movement of logs had "not been shown to have gone to the trucks to any substantial extent where the hauls are over 25 miles"; that "truck-competitive rates for distances un-
[fol. 1210] der 25 miles would regain little, if any, traffic"; and that the maintenance of the Cummer scale to meet what little truck competition could be met in that way would greatly decrease the revenues of the Atlantic Coast Line Railroad Company and would not be warranted. 190 I. C. C. p. 599.

We perceive no ground for the contention that the Commission has failed to make the basic findings necessary to support its ultimate conclusion.

Third. The evidence before the Commission. The question of the weight of the evidence was for the Commission and not for the court. The authority conferred upon the Commission by Section 13 (4) of the Interstate Commerce Act, with respect to intrastate rates, is not different in its quality or effect from that given to the Commission to prevent other sorts of unjust discrimination against interstate commerce. That authority rests upon the constitutional power of Congress, extending to interstate carriers as instruments of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard, or destroy that commerce; and to provide for the execution of that power through a subordinate body. The Shreveport Case, 234 U. S. 342, 351, 354, 355; Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., supra. The purpose for which the Commission was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case there is an unjust discrimination against interstate commerce. United States v. Louisville & Nashville R. R. Co., 235 U. S. 314, 320. That purpose unquestionably extended to the prohibited discrimination produced by intrastate rates. In relation to such a discrimination, as in other

matters, when the Commission exercises its authority upon due hearing, as prescribed, and without error in the application of rules of law, its findings of fact supported by substantial evidence are not subject to review. It is not the province of the courts to substitute their judgment for that of the Commission. Interstate Commerce Commission [fol. 1211] v. Louisville & Nashville R. R. Co., 227 U. S. 88, 100; Western Chemical Company v. United States, 271 U. S. 268, 271; Virginian Railway Company v. United States, 272 U. S. 658, 663; Assigned Car Cases, 274 U. S. 564, 580; Merchants Warehouse Company v. United States, 283 U. S. 501, 508; Crowell v. Benson, 285 U. S. 22, 50, 51.

We agree with the conclusion of the District Court that there was no lack of substantial evidence to support the Commission's findings.

The Commission's determinations were "without prejudice to the right of the authorities of the State of Florida or of any other interested party to apply in the proper manner for a modification of its (our) findings and order as to any specified intrastate rate on the ground that it is not related to interstate rates in such a way as to contravene the provisions of the Interstate Commerce Act." 190 I. C. C., p. 600.

Decree affirmed.

A true copy. Test:

—— ——, Clerk, Supreme Court, U. S.

[fol. 1212] [File endorsement omitted.]

[fol. 1213] ITEM NO. 34 OF THE PRÆCIPE OF APPELLANT

(Item) 34. Certified Copy of so Much of the Record of the Hearing Had Before the Special Master on the Second Order of Reference, Beginning March 27, 1933, as Is Contained on Pages 1-4, Both Inclusive

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

THE WILSON LUMBER COMPANY et al.

vs.

THE ATLANTIC COAST LINE RAILROAD COMPANY et al.

Extract from the Transcript of Evidence, pages 1 to 4 both inclusive, before Hon. Horace M. Holden, Special Master.

Present:

For Complainants:
Messrs. Knight, Adair, Cooper & Osborne (Mr. H. P. Adair and Mr. C. G. Ashley, of Counsel)
Mr. August G. Gutheim, Washington, D. C.
For Wilson Cypress Company, and The Cummer Cypress Co.
Messrs. Norman, Quirk & Graham, Louisville, Ky. (Mr. King of Counsel)
For Wilson Lumber Company.
Mr. T. T. Turnbull, Tallahassee, Florida,
For State of Florida, on behalf of Log Shippers.
For Defendants:
Messrs. Alston, Alston, Foster & Moise, Atlanta, Ga. (Mr. Robert C. Alston and Mr. Moise, of Counsel)

[fol. 1214] Mr. Adair: If the Court please, I would like to have the record show at the outset that we do not confess the errors of our way or the wisdom or propriety of the decision of the Master and of the Court in the determination that the Cummer scale is not a just and lawful measure for restitution to be made us. We wish to save the point though we do now proceed and in proceeding insist that we are right and so proceeding does not cut off our rights in any Court of Appeal or otherwise to insist that the Cummer scale is the proper measure.

Mr. Alston: If your Honor pleases, the order of re-reference in this case contains the following sentence:

"Under the special circumstances of this case we adjudge that the claimants of restitution should have the same only upon condition that they submit to an investigation of the true rights of the carrier to collect for the transportation of their logs during the period covered by the restitution, and submit to such an adjudication as will justly and finally settle the accounts between such claimants and the carrier."

It also contains the following sentence:

"To this end we recommit this matter to the Master, with direction that he ascertain whether the charge made by the carrier for transportation in each instance was a reasonable one as measured by common law standard, and

if not, what was the reasonable charge to be made, and that he measure and award to each claimant restitution accordingly."

Then in the order of March 20th, 1933, the Court said:

"We have sustained our jurisdiction to make restitution for the period covered by our erroneous refusal to enjoin the attacked order, and this alone under the equitable conditions which we imposed is now before the Master."

[fol. 1215] We submit that the statement of our learned opponent does not comply with the requirements of either of these orders and that until compliance shall have been made by them they have no right to proceed in this rehearing; that the proceeding proposed by them does not conform to the requirements of the Court in either of the orders mentioned. The result is we object to the proceeding in this cause by the claimants.

Mr. Adair: If the Court please, I am sorry if in my poor blundering way I have been so inarticulate as to bring about this retort from my adversary. What I meant to say was that we are proceeding under the order of the Court, but we are saving the point. While this Court can cut off our right to proceed further along a particular line in this Court, what I wanted to make perfectly clear was that we are not waiving our right to proceed in the Supreme Court of the United States when we get through before your Honor and with Judge Sibley's court, in the event that the decision is not in accordance with what we consider the law to be. Do you understand our position, your Honor?

Court: I understand you.

Mr. Alston: The statement just made by counsel makes it perfect clear, your Honor, that they are proceeding contrary to the order of the Court entered in this matter, or the order of re-reference by the Court in this matter, filed on [fol. 1216] the third day of January, 1933, and I, therefore, renew my objection.

Court: Well, as I understand the position of the Claimants, they are going to proceed with this matter, but they do not acquiesce in the correctness of the order or acquiesce in any order that might preclude them from excepting to the order that they have no right to proceed in this case

unless they abandon all their contentions. That is the way I understand their position.

Mr. Alston: Your Honor, the position cannot be taken, I submit, for this Court has re-referenced this case only in that "Under the special circumstances of this case we adjudge that the claimants of restitution should have the same only upon condition that they submit to an investigation of the true rights of the carrier to collect for the transportation of their logs during the period covered by the restitution, and submit to such an adjudication as will justly and finally settle the accounts between such claimants and the carrier." That is not being done. The right to this rehearing is on the condition which is stated in this order, and that condition is not being fulfilled by the position which has been taken by the claimants.

Mr. Adair: We recognize that the law of the case is written in the opinion; that your Honor is bound by the opinion and we are bound by the opinion before your Honor; we are bound by the decision obtained before this Court, but as [fol. 1217] far as I know no court of equity has ever tried to cut off the right to have its blunders reviewed by a superior court, and I don't believe it was the purpose of this court to attempt so to do. We are proceeding under that order. It is the law of the case. Your Honor is bound by the opinion in the order of re-reference and we are bound by it. It has been adjudged that in so far as the Cummer scale is concerned it is not the general measure of restitution, and in this particular case, or some of these cases we will show the Cummer scale is unreasonable high, or I believe so, but whether we will be able to prove it or not is another point. Shall we proceed, your Honor?

Court: I think I should proceed with this order without undertaking to decide the effect of it. The effect of it is a matter for future consideration by the Courts having higher authority than I. Of course your objections, Mr. Alston, as to their proceedings might preclude them, and of course you preserve by your statement here your contention that they have no right to proceed with this case without waiving error.

Mr. Adair: We don't waive any error. We are proceeding under the order and according to the order, as we must, and we want to be perfectly and thoroughly understood that we don't waive any errors that the court may

hitherto have made in this or any other hearing. In other words, we will conform to the order of the Court, with right of appeal.

A true, correct and complete copy of the original four pages as indicated.

C. A. McGrew, Deputy Clerk. (Seal U. S. District Court, N. D. Georgia.)

[fol. 1218] In United States District Court

No. 511. No. 512. No. 514

[Titles omitted]

[fol. 1219] Order of Consolidation—Filed April 17, 1934

Atlantic Coast Line Railroad Company, one of the defendants in the above entitled causes, having by its motion heretofore filed shown unto the Court that the three above entitled Constituent Causes were consolidated for trial and hearing and having asserted in said motion that said causes should now be consolidated into one proceeding and only one final decree entered, and having prayed that an order of consolidation be entered for such purpose, it is upon consideration thereof:

Ordered that the above entitled causes be and hereby are consolidated into one cause and thereafter proceed as one cause under the title of "State of Florida, and E. S. Matthews, Mamie Eaton-Greene and W. B. Douglass, as and constituting The Florida Railroad Commission, et al., Complainants, vs. United States of America, Interstate Commerce Commission, Atlantic Coast Line Railroad Company, et al., Defendants, In Equity, No. 514, Consolidated Cause."

This 14th day of April, 1934.

Sam'l H. Sibley, U. S. Circuit Judge. Wm. H. Barrett, U. S. District Judge. E. Marvin Underwood, U. S. District Judge.

[fol. 1220] [File endorsement omitted.]

[fol. 1221] In United States District Court for the Northern District of Georgia, Atlanta Division

In Equity

Consolidated Cause No. 514

State of Florida, and E. S. Matthews, Mamie Eaton-Greene, and W. B. Douglass, as and Constituting The Florida Railroad Commission, et al., Complainants,

versus

United States of America, Interstate Commerce Commission, Atlantic Coast Line Railroad Company, et al., Defendants

Final Decree of Restitution—Filed April 17, 1934

This cause came on to be further heard at this term before the Honorable Samuel H. Sibley, United States Circuit Judge, the Honorable E. Marvin Underwood, United States District Judge, and the Honorable William H. Barrett, United States District Judge, and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows, viz:

I

(a) That the defendant Atlantic Coast Line Railroad Company ought to restore to the complainants Brooks-Scanlon Corporation, Cummer Cypress Company and Wilson Cypress Company, severally, the sums hereinafter set opposite their respective names, such sums being the amounts (including principal and interest thereon at the rate of eight per centum (8%) per annum, computed to [fol. 1222] April 14th, 1934) which the Court has found and hereby finds to have been lost by the said complainants, respectively, by virtue of the failure of this Court to enjoin and set aside in the first instance the order of the Interstate Commerce Commission which was afterwards enjoined and set aside by this Court pursuant to the mandate of the Supreme Court of the United States, such amounts, principal and interest, and the total thereof, being as follows, viz:

Complainant	Amount of principal	Amount of interest	Total sums
Brooks-Scanlon Corporation.....	$1,914.66	$698.75	$2,613.41
Cummer Cypress Company.....	16,589.08	6,102.99	22,692.07
Wilson Cypress Company.....	53,430.84	16,855.64	70,286.48

(b) That the defendant, Atlantic Coast Line Railroad Company do pay to the said complainants Brooks-Scanlon Corporation, Cummer Cypress Company and Wilson Cypress Company, severally, and that the said complainants Brooks-Scanlon Corporation, Cummer Cypress Company and Wilson Cypress Company severally, do have and recover of and from the Atlantic Coast Line Railroad Company, the respective sums of money set opposite the names of such complainants respectively below, viz:

The complainant, Brooks-Scanlon Corporation, the sum of $2,613.41;

The complainant, Cummer Cypress Company, the sum of $22,692.07;

The complainant, Wilson Cypress Company, the sum of $70,286.48,

for which said sums so set opposite the names of such complainants respectively in this sub-paragraph (b) let separate executions issue to such complainants severally.

[fol. 1223] (c) That in addition to the interest included in the sums decreed to be paid to and recovered by the complainants named in sub-paragraph (b) of Paragraph I of this decree, the defendant Atlantic Coast Line Railroad Company do pay to such complainants respectively, interest at the rate of six per centum (6%) per annum from and after the date of this decree upon the amounts set opposite the names of such complainants respectively in the column captioned "Amount of Principal" in sub-paragraph (a) of Paragraph I of this decree.

II

(a) That the defendant Atlantic Coast Line Railroad Company ought to restore to the complainant Wilson Lumber Company of Florida the sum hereinafter set opposite its name, such sum being the total amount (including principal and interest thereon at the rate of eight per centum (8%) per annum, computed to April 14th, 1934), which the Court has found and hereby finds to have been lost by the said complainant by virtue of the failure of this Court to

enjoin and set aside in the first instance the order of the Interstate Commerce Commission which was afterwards enjoined and set aside by this Court pursuant to the mandate of the Supreme Court of the United States, such amounts, principal and interest, and the total thereof, being as follows, viz:

Complainant	Amount of principal	Amount of interest	Total sum
Wilson Lumber Company of Florida..	$14,172.64	$4,996.10	$19,168.74

(b) That the defendant Atlantic Coast Line Railroad Company do pay to the complainant Wilson Lumber Company of Florida, and that said complainant do have and [fol. 1224] recover of and from the Atlantic Coast Line Railroad Company the sum of $19,168.74, for which said sum let separate execution issue to the complainant Wilson Lumber Company of Florida.

(c) That in addition to the interest decreed to be paid to and recovered by the complainant Wilson Lumber Company of Florida, the defendant Atlantic Coast Line Railroad Company do pay to such complainant interest at the rate of six per centum (6%) per annum from and after the date of this decree upon the sum of $14,172.64.

III

(a) That the defendant Atlantic Coast Line Railroad Company ought to restore to the complainants E. S. Matthews, Mamie Eaton-Greene and W. B. Douglass, as and constituting the Florida Railroad Commission, for the use and benefit of the several shippers hereinafter named, the sums hereinafter set opposite the respective names of such shippers, such sums being the amounts (including principal and interest thereon at the rate of eight per centum (8%) per annum, computed to April 14th, 1934) which the Court has found and hereby finds to have been lost by such shippers, respectively, by virtue of the failure of this Court to enjoin and set aside in the first instance the order of the Interstate Commerce Commission which was afterwards enjoined and set aside by this Court pursuant to the mandate of the Supreme Court of the United States, such amounts principal and interest, and the totals thereof, being as follows, viz:

[fol. 1225]

Shipper	Amount of principal	Amount of interest	Total sums
J. Ray Arnold Lumber Company	$1,001.03	$271.46	$1,272.49
American Hardwood Corporation	1,031.41	371.12	1,402.53
Atlantic Hardwood Corporation	847.59	330.21	1,177.80
Brown Brothers Company, No. 1	144.19	56.04	200.23
Brown Brothers Company, No. 2	29.56	11.41	40.97
Brown Hardwood Company	31.69	10.13	41.82
Brown Investment Company	59.30	20.54	79.84
F. S. Buffum & Company	559.01	152.70	711.71
Dense Pine Lumber Company	18.25	7.15	25.40
Dowling-Camp Lumber Company	11.00	3.52	14.52
Everglades Cypress Company	1,470.31	405.58	1,875.89
Gress Manufacturing Company	121.45	32.51	153.96
Hair Hardwood Company	158.94	58.32	217.26
Hazzard Brothers	156.15	45.72	201.87
Hessler Hardwood Company	306.68	120.96	427.64
J. W. Jones Lumber Company	312.15	113.54	425.69
Krusen Land & Timber Company	131.12	41.03	172.15
Long Leaf Lumber Company	1,490.77	593.77	2,084.54
Putnam Lumber Company	3,393.68	936.68	4,330.36
Southeastern Hardwood Co	345.62	106.80	452.42
Eugene Stacey	39.82	12.60	52.42
Eugene Stacey	138.89	50.27	189.16
Geo. B. Stallings Company	52.04	14.46	66.50
Ben Tillman	18.44	5.76	24.20
Thompson-Katz Lumber Company	132.23	44.09	176.32
Thompson-Katz Lumber Company	1,776.70	624.44	2,401.14
Wilson-Otwell Lumber Company	56.54	18.49	75.03

[fol. 1226] (b) That the defendant, Atlantic Coast Line Railroad Company, do pay to the complainants E. S. Matthews, Mamie Eaton-Greene and W. B. Douglass, as and constituting the Florida Railroad Commission, for the use and benefit of the several shippers hereinafter named, and that the complainants E. S. Matthews, Mamie Eaton-Greene and W. B. Douglass, as and constituting the Florida Railroad Commission, do have and recover of and from the defendant, Atlantic Coast Line Railroad Company, for the use and benefit of the several shippers hereinafter named, the respective sums of money set opposite the respective names of such shippers below, viz:

[fol. 1227]

Shipper	Sums of money
J. Ray Arnold Lumber Company	$1,272.49
American Hardwood Corporation	1,402.53
Atlantic Hardwood Corporation	1,177.80
Brown Brothers Company, No. 1	200.23
Brown Brothers Company, No. 2	40.97
Brown Hardwood Company	41.82
Brown Investment Company	79.84
F. S. Buffum & Company	711.71
Dense Pine Lumber Company	25.40

Shipper	Sums of money
Dowling-Camp Lumber Company	14.52
Everglades Cypress Company	1,875.89
Gress Manufacturing Company	153.96
Hair Hardwood Company	217.26
Hazzard Brothers	201.87
Hessler Hardwood Company	427.64
J. W. Jones Lumber Company	425.69
Krusen Land & Timber Company	172.15
Long Leaf Lumber Company	2,084.54
Putnam Lumber Company	4,330.36
Southeastern Hardwood Co.	452.42
Eugene Stacey	52.42
Eugene Stacey	189.16
Geo. B. Stallings Company	66.50
Ben Tillman	24.20
Thompson-Katz Lumber Company	176.32
Thompson-Katz Lumber Company	2,401.14
Wilson-Otwell Lumber Company	75.03

[fol. 1228] for which said sums so set opposite the names of such shippers respectively, in this sub-paragraph (b) of Paragraph III of this decree let separate executions issue to the complainants E. S. Matthews, Mamie Eaton-Greene and W. B. Douglass, as and constituting the Florida Railroad Commission, for the use and benefit of such shippers respectively.

(c) That in addition to the interest included in the sums decreed to be paid to and recovered by the complainants for the use and benefit of the several shippers named in sub-paragraph (b) of Paragraph III of this decree, the defendant Atlantic Coast Line Railroad Company do pay to such complainants for the use and benefit of such shippers respectively interest at the rate of six per centum (6%) per annum from and after the date of this decree upon the amounts set opposite the names of such shippers respectively in the column captioned "Amount of Principal" in sub-paragraph (a) of Paragraph III of this decree.

Done and ordered this 14th day of April, A. D. 1934.

Sam'l H. Sibley, United States Circuit Judge. Wm. H. Barrett, United States District Judge.

I respectfully dissent.

E. Marvin Underwood, United States District Judge.

[fol. 1229] [File endorsement omitted.]

[fol. 1230] IN UNITED STATES DISTRICT COURT

No. 514

Consolidated Cause in Equity

[Title omitted]

NOTICE OF INTENTION TO APPEAL—Filed May 19, 1934

To the Attorney General of the United States of America; the Interstate Commerce Commission; the Georgia Public Service Commission; the Attorney General of the State of Georgia:

Please take notice that it is the intention of the Atlantic Coast Line Railroad Company, by its solicitors, to enter an appeal in the above numbered and styled cause from the final decree herein dated April 14, 1934, entered and filed April 17, 1934, on complainant's motions for restitution. Said appeal will be presented for allowance to the United States District Judge at his Chambers, Post Office Building, Atlanta, Georgia, on April 28, 1934, at 9:30 o'clock A. M. Please be present and signify whether it is your purpose to join in this appeal.

This 19th day of April, 1934.

Carl H. Davis, W. E. Kay, Robert C. Alston, Wm. Hart Sibley, Solicitors for Atlantic Coast Line Railroad Company. Alfred P. Thom, Alston, Alston, Foster & Moise, of Counsel.

[File endorsement omitted.]

[fol. 1231] Service of the foregoing notice is acknowledged; copy received; all other and further service or notice is hereby waived.

This 20th day of April, 1934.

Elmer B. Collins, for the Attorney General of the United States. J. Stanley Payne, for the Interstate Commerce Commission. J. J. E. Anderson, Assistant Atty. General, for the Georgia Public Service Commission. M. J. Yeomans, for the Attorney General of the State of Georgia.

[File endorsements omitted.]

[fol. 1232] Service of the foregoing notice is acknowledged; copy received; all other and further service or notice is hereby waived.

This 26th day of April, 1934.

J. V. Norman, for Wilson Lumber Company of Florida.

[fol. 1233] Service of the foregoing notice is acknowledged; copy received; all other and further service or notice is hereby waived.

This 27th day of April, 1934.

H. E. Carter, Asst. Atty. Gen., for the Attorney General of the State of Florida.

[fol. 1234] Service of the foregoing notice is acknowledged; copy received; all other and further service or notice is hereby waived.

This 19th day of April, 1934.

Henry P. Adair, C. G. Ashby, Knight, Adair, Cooper & Osborne, for Brooks-Scanlon Corp., Cummer Cypress Company, Wilson Cypress Company.

[fol. 1235] Service of the foregoing notice is acknowledged; copy received; all other and further service or notice is hereby waived.

This 19 day of April, 1934.

Theo. T. Turnbull, as Attorney for the Florida Railroad Commission.

[fol. 1236] IN UNITED STATES DISTRICT COURT

No. 514

Consolidated Cause in Equity

[Title omitted]

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS, AND PRAYER FOR REVERSAL—Filed May 19, 1934

Atlantic Coast Line Railroad Company, defendant in the above numbered and styled consolidated cause, feeling itself aggrieved by the final decree of the United States District Court for the Northern District of Georgia, dated

April 14, 1934, and entered and filed April 17, 1934, in the above numbered and styled consolidated cause, prays that an appeal be allowed to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith.

[fol. 1237] Petitioner shows that notice of intention to apply for this appeal has been given to all parties defendant to this record, said notice being hereto attached.

Petitioner prays that an appeal be allowed and that an order be entered fixing the amount of the bond thereon, and that citation be issued as provided by law and that a transcript of the record (or the original record, as the case may be), proceedings and decree, duly authenticated, be transmitted to the Supreme Court of the United States.

Assignment of Errors

Atlantic Coast Line Railroad Company assigns the following errors in the record and proceedings in said cause: That is to say:

The District Court erred:

1. In entering its final decree of April 17, 1934, and therein decreeing the payment by appellant to the various appellees of the several amounts of restitution as therein set out and aggregating in total the amount of approximately $136,000., which decree was entered after the decree of the District Court, refusing to enjoin the orders of the Interstate Commerce Commission in Docket 18364, had been affirmed by the Supreme Court of the United States in its opinion of April 2, 1934, in Florida versus United States, et al.; and which restitution was based on the fact that Atlantic Coast Line Railroad Company had charged [fol. 1238] to and collected from said several appellees, for the transportation of logs intrastate in Florida, during the period February 8, 1929-April 10, 1931, the rates prescribed by the Interstate Commerce Commission by its order of August 2, 1928, in said Docket 18364, as necessary to remove a burden on interstate commerce.

2. In entering its decree of March 7, 1931, and therein construing the mandate of the Supreme Court of the United States, entered pursuant to its opinion of January 5, 1931, in this case, as requiring the holding by the lower court, and in holding, that the order of the Interstate Commerce

Commission, dated August 2, 1928, entered in Docket 18364, and prescribing rates for the intrastate transportation by appellant of logs in Florida, was null and void.

3. In failing to hold in its decree of March 7, 1931, as requested by appellant in its response, as amended, to the motions for restitution filed by appellees in the lower court after the said opinion of January 5, 1931, in this case, that the Supreme Court of the United States had not by its said opinion, nor by its mandate, held void the said August 2, 1928, order of the Interstate Commerce Commission, but had, as shown by its said opinion set aside the said order for want of findings, with the statement that the Commission "is still at liberty, acting in "accordance with the au- [fol. 1239] thority conferred by the statute, to make such determination as the situation may require," thereby showing that the Supreme Court had deferred its ultimate determination of the validity of said order until such findings had been made by the Commission.

4. In failing to hold in its decree of March 7, 1931, that all action by the District Court on the motions for restitution filed in this case should be deferred until the Interstate Commerce Commission had completed its consideration of its said Docket 18364, (that is the cause in which the Commission's orders involved in this cause were issued,) motions for the reopening of which, filed in March, 1931, were granted by said Commission on April 6, 1931.

5. In failing to hold that it was without jurisdiction to order the restitutions prayed for by the appellees.

6. In entering its decree of July 31, 1931, wherein, with knowledge that the Interstate Commerce Commission had reopened the proceedings in its docket 18364, the District Court held that it had jurisdiction prior to action by said Interstate Commerce Commission in said proceedings, to award restitution against appellant because of the fact that appellant had during the period from February 8, 1929 to March 7, 1931, or shortly thereafter, charged and collected from the appellees the rates prescribed by the Interstate [fol. 1240] Commerce Commission in its said Docket 18364 for the intrastate transportation of logs in Florida over appellant's lines for distances up to 170 miles.

7. For that, with knowledge that the Interstate Commerce Commission had reopened the proceedings before it

in its Docket 18364, the District Court by its decree of July 31, 1931, referred the cause to a special master "to ascertain and report to this court the sums severally due to the complainants or other persons represented by the Florida Railroad Commission in this suit by the Atlantic Coast Line Railroad Company as overcharges exacted between said dates by virtue of said invalid order of the Interstate Commerce Commission, as measured by the difference between the amount collected and the establishd lawful rate in force at the time each shipment was made as the Master may find it to have been."

8. In entering its decree of March 16th, 1932, entered and filed March 18, 1932, and therein reaffirming its holding theretofore made that the order of the Interstate Commerce Commission entered August 2, 1928, in said Docket 18364, "is void and can itself give the Atlantic Coast Line Railroad Company no aid or protection" against the claims for restitution made against it.

[fol. 1241] 9. For that the appellees asserted that the "established lawful rate in force at the time each shipment was made" as referred to in the court's order of reference of July 31, 1931, was the Cummer Scale and they presented their case on that basis. The Master found the Cummer Scale of rates was unjust, unreasonable, and confiscatory and was not the lawfully established rate. The District Court, by its decree of January 30, 1933, without motion from appellees, re-referred the case to the Master notwithstanding the rights and position which this appellant had thereby acquired; and this was done notwithstanding the fact that the Interstate Commerce Commission had previously thereto issued its two reports on the reopened hearing before it in which it found that the rates established by it in its first order of August 2, 1928, were reasonable and just rates and the rates which should be used in order to remove unjust discrimination against interstate commerce; and also notwithstanding the fact that the Cummer Scale had been previously held by the District Court in its conclusions of law and findings of fact filed with said order, to be confiscatory.

10. In holding in its decree of January 30, 1933, that the Florida shippers, appellees here, were or might be entitled to restitution on the basis of some "common law standard

of reasonableness as fixed by the court," and in referring [fol. 1242] the matter again to the Master with direction that he ascertain "whether the charge made by the carrier in each instance was a reasonable one as measured by common law standard, and if not what was the reasonable charge to be made;" the said "charge made by the carrier in each instance" being that prescribed by the Interstate Commerce Commission in Docket 18364, by its order of August 2, 1928, and, after reopening, of July 5, 1932 and January 9, 1933, of all of which said orders of the Interstate Commerce Commission the court was advised in this proceeding prior to the entry of this decree.

11. For that the District Court overruled the motion of appellant filed on March 7, 1933, and denied each and all of the prayers thereof which included the prayer that the reference to the Master be revoked and that decree be entered holding that the Atlantic Coast Line was not liable to claimants in any sum whatsoever; and if that was not granted, that the proceedings be deferred until claimants should have submitted their claims to the Interstate Commerce Commission for the ascertainment of whether or not there were overcharges for the period involved and if so the extent thereof; that if those prayers were denied, that the reference be broadened so as to procure such an adjudi- [fol. 1243] cation as would justly and finally settle the accounts between the claimants and the Atlantic Coast Line as to both periods involved. That is, the period from February 8, 1929 to March, 1931 and from March, 1931 until February 25, 1933, when the second and third orders of the Interstate Commerce Commission went into effect.

12. In entering its decree of March 20, 1933 (which decree was entered after the District Court had, by its decree of February 24, 1933, refused to enjoin the orders of the Interstate Commerce Commission in Docket 18364 dated July 5, 1932 and January 9, 1933, which orders were subsequently, on April 2, 1934, upheld by the Supreme Court, and also after the District Court had held the Cummer scale of rates confiscatory), and in thereby refusing to direct the master to consider and report the amounts due to Atlantic Coast Line Railroad Company by the appellees, parties to this proceeding, for the transportation of logs for them, intrastate in Florida, by said railroad company during the period March 7, 1931-February 25,

1933, when said railroad company collected for such intrastate transportation of logs only the Cummer scale of rates, but with notice to all shippers that said railroad company would, after the Commission had concluded its investigation in said Docket 18364, make demand for further amounts on account of such transportation.

[fol. 1244] 13. In not holding that the appellees had elected not to comply with the equitable condition placed upon them by the District Court in its order of re-reference entered by a majority of the court and filed January 30, 1933, and that because of such election appellees were not entitled to proceed with the re-reference; said condition contained in said order being as follows:

"It is ordered that the exceptions be overruled and the report confirmed so far as it has gone and except as modified by the conclusions of law and fact filed herewith. Under the special circumstances of this case, we adjudge that the claimants for restitution should have the same only upon condition that they submit to an investigation of the true rights of the carrier to collect for the transportation of their logs during the period covered by the restitution and submit to such an adjudication as will justly and finally settle the accounts between such claimants and the carrier."

14. In entering its decree of April 17, 1934, and thereby decreeing restitution against appellant, although one of the three judges dissented and the other two were unable to agree as to whether the appellees had complied with the condition imposed on them by the District Court, by its decree of January 30, 1933, as the condition precedent to their right to recover anything against appellant.

15. In disregarding, in not hearing argument on, and in not granting the motion filed by appellant on March 30, 1934; and likewise in disregarding, in not hearing argu-
[fol. 1245] ment on, and in not granting the amended motion filed in this cause by appellant on April 14, 1934, which said motions alleged that the Supreme Court of the United States, by its opinion of April 2, 1934, in Florida versus United States, had held that the findings made by the Interstate Commerce Commission in its July 5, 1932 report in Docket 18364, were sufficient and amply sustained by the evidence and supplied what had theretofore been found to be lacking in the 1928 report of the Interstate Commerce

Commission; and in failing to hold that there could be no restitution awarded against appellant as claimed by appellees in the motions filed by them in these proceedings.

16. For that its findings of fact did not justify and do not sustain the decree appealed from.

17. For that the pleadings of the appellees did not justify or sustain the decree appealed from.

Prayer for Reversal

For which errors petitioner prays that the said decree of the United States District Court for the Northen District of Georgia, entered and filed April 17, 1934, in the above entitled cause be reversed and a decree be rendered in favor of petitioner and for costs.

Carl H. Davis, W. E. Kay, Wm. H. Sibley, Robert Alston, Solicitors for Petitioner. Alfred P. Thom, Alston, Alston, Foster & Moise, of Counsel.

[File endorsement omitted.]

[fol. 1246] In United States District Court for the Northern District of Georgia, Atlanta Division

No. 514

Consolidated Cause in Equity

State of Florida and E. S. Matthews, Mamie Eaton-Greene, and W. B. Douglass, as and constituting the Florida Railroad Commission; Brooks-Scanlon Corporation; Cummer Cypress Company, Wilson Cypress Company and Wilson Lumber Company of Florida; and E. S. Matthews, Mamie Eaton-Greene and W. B. Douglass, as and constituting the Florida Railroad Commission, for the use and benefit of the several shippers named in Paragraph III of the final decree of restitution, Complainants,

versus

United States of America, Interstate Commerce Commission, Atlantic Coast Line Railroad Company et al., Defendants

Order Allowing Appeal—Filed May 19, 1934

The appellant in the above entitled cause having prayed for the allowance of an appeal in this cause to the Supreme

Court of the United States from the decree dated April 14, 1934, and entered in the above entitled suit by the United States District Court for the Northern District of Georgia on April 17, 1934, and from each and every part thereof, and due notice having been given of the intention to apply for said appeal to the Attorney General of the United States, the Interstate Commerce Commission, the Attorney General of the State of Georgia, and the Georgia Public Service Commission, and no appearance being made by any of them, and having presented and filed its petition for [fols. 1247 & 1248] appeal, assignment of errors, and prayer for reversal pursuant to the statutes and the rule of the Supreme Court of the United States in such cases made and provided;

After consideration it is now here ordered that the separate appeal of Atlantic Coast Line Railroad Company be and the same is hereby allowed to the Supreme Court of the United States from the United States District Court for the Northern District of Georgia in this cause, as provided by law;

It is further ordered that the clerk of the Court appealed from shall prepare and certify a transcript of the record, or the original record, as the case may be, proceedings and decree in this cause and transmit the same to the Supreme Court of the United States so that the same shall be in said Court within forty days of this date.

It is further ordered that security for costs on appeal be fixed in the sum of One Thousand Dollars and a bond with good and sufficient surety in said amount, to be approved by this Court, be filed, conditioned upon the said appellant and prosecuting its appeal to effect and answering all costs if it fails to make its plea good.

This 19 day of May, 1934.

Samuel H. Sibley, United States Circuit Judge. Wm. H. Barrett, United States Circuit Judge. E. Marvin Underwood, United States District Judge.

[File endorsement omitted.]

[fols. 1249-1254] Bond on appeal for $1,000.00 approved and filed May 19, 1934, omitted in printing.

[fols. 1255-1258] Citation in usual form, showing service on Theo. T. Turnbull et al., filed May 19, 1934, omitted in printing.

[fol. 1259] IN UNITED STATES DISTRICT COURT

No. 514

Consolidated Cause in Equity

[Title omitted]

NOTICE OF MOTION FOR ORDER OF SEVERANCE—Filed June 4, 1934

To United States of America, Interstate Commerce Commission, Georgia Public Service Commission, and/or Their Attorneys of Record:

Please take notice that the undersigned will move this Court, at the United States District Court Rooms, Post Office Building, in Atlanta, Georgia, on the 26th day of May, 1934, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order of severance from all of the co-defendants for the purposes of appeal from the decree in the above entitled cause entered on April 17, 1934, to the Supreme Court of the United States.

Dated this 16th day of May, 1934.

Carl H. Davis, W. E. Kay, Robert C. Alston, Wm. Hart Sibley, Attorneys for Atlantic Coast Line Railroad Company, Defendant. Alfred P. Thom, Alston, Alston, Foster & Moise, of Counsel.

[fol. 1260] The above and foregoing notice of intention to move the court for an order of severance in this matter is acknowledged; copy received.

This 16th day of May, 1934.

Elmer B. Collins, Special Assistant to the Attorney General, for the United States of America. J. Stanley Payne, for the Interstate Commerce Commission. J. J. E. Anderson, for the Georgia Public Service Commission.

[fol. 1261] IN UNITED STATES DISTRICT COURT

No. 514

Consolidated Cause in Equity

[Title omitted]

MOTION FOR SEVERANCE AND ORDER THEREON—Filed June 4, 1934

Now comes Atlantic Coast Line Railroad Company, a defendant in the above entitled cause, and shows to the Court that it filed its assignment of errors and petition for allowance of appeal from the decree entered in the above entitled cause on the 17th day of April, 1934; that a request to join in said appeal has been served upon each and all of its co-defendants and that each and all of said co-defendants have failed, neglected and refused to join in said appeal; said notice being attached to the petition for allowance of the appeal.

Wherefore, Atlantic Coast Line Railroad Company, defendant herein, prays that the Court make an order of severance from all of its co-defendants for the purpose of an appeal to the Supreme Court of the United States from the decree entered herein on April 17, 1934, and for such other and further relief as may be proper in the premises.

[fol. 1262] Dated this 26th day of May, 1934.

Carl H. Davis, W. E. Kay, Robert C. Alston, Wm. Hart Sibley, Attorneys for Atlantic Coast Line Railroad Company, Defendant. Alfred P. Thom, Alston, Alston, Foster & Moise, of Counsel.

The above and foregoing motion having been presented to us and it appearing that the United States of America, the Interstate Commerce Commission, and the Georgia Public Service Commission, co-defendants in the above cause, have been duly notified and requested by said Atlantic Coast Line Railroad Company to join in its said petition for appeal, but that they have failed or refused to join therein, it is considered, ordered and decreed that the said Atlantic Coast Line Railroad Company be, and the same is, hereby granted the right to appeal alone without joining the said United States of America, Interstate

Commerce Commission and Georgia Public Service Commission, co-defendants, as appellants therein.

Dated this 31 day of May, 1934.

Sam'l H. Sibley, United States Circuit Judge. Wm. H. Barrett, United States District Judge. E. Marvin Underwood, United States District Judge.

[fol. 1263] [File endorsement omitted.]

[fol. 1264] IN SUPREME COURT OF THE UNITED STATES

October Term, 1934

[Title omitted]

PETITION FOR SUPERSEDEAS

To the Honorable the Chief Justice of the United States or any Associate Justice of the Supreme Court of the United States:

Comes now Atlantic Coast Line Railroad Company, appellant in the above entitled cause, and represents unto this Honorable Court:

1

That an appeal to this court, styled as above, has been duly allowed and entered by the United States District Court for the Northern District of Georgia, Atlanta Division, on the 19th day of May, 1934, from a decree therein entered and filed April 17, 1934. Citation has been duly issued and served.

2

Petitioner shows that the decree appealed from requires that payment be made by appellant to appellees of large sums of money, aggregating $99,941.78 principal, $33,112.78 interest to April 14, 1934, and interest on said principal sum at six per centum per annum from and after April 14, 1934.

[fol. 1265]

3

Petitioner further shows that under the provisions of law in such cases made and provided (Urgent Deficiencies

Act of October 22, 1913, Chapter 32; 38 Statutes 220; Judicial Code §210; 28 U. S. C. A., ¶47a) only the Supreme Court or a Justice thereof may grant a supersedeas of said decree. Your petitioner presents herewith a bond with surety and respectfully requests that the same be approved as to form, substance and surety.

Wherefore, petitioner prays that an order be entered granting supersedeas and staying the decree of the District Court herein described and that the bond tendered herewith be approved and accepted.

Petitioner prays for such further relief as may be meet and proper.

Carl H. Davis, W. E. Kay, Robt. C. Alston, Wm. Hart Sibley, Solicitors for Petitioner. Alfred P. Thom, Alston, Alston, Foster & Moise, of Counsel.

[fol. 1266] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER SUPERSEDING DECREE—Filed June 7, 1934

The above and foregoing petition of Atlantic Coast Line Railroad Company, appellant, having been presented, after consideration thereof,

It is ordered and adjudged, that the bond tendered by the appellant, Atlantic Coast Line Railroad Company, in the sum of $150,000, upon which the United States Fidelity and Guaranty Company appears as surety, be, and the same is, hereby approved and ordered filed in the office of the Clerk of the United States District Court for the Northern District of Georgia, Atlanta Division, and the decree of the United States District Court for the Northern District of Georgia, Atlanta Division filed on the 17th day of April, 1934, involved in this appeal, be, and the same is, hereby superseded and stayed during the pendency of the appeal in this cause.

This 6th day of June, 1934.

Harlan F. Stone, Associate Justice Supreme Court of the United States.

[File endorsement omitted.]

[fol. 1267] The foregoing bond, the original of which is executed by the Atlantic Coast Line Railroad Company, is approved as to form and substance, as to surety and as to the penal sum thereof.

The foregoing form of order of supersedeas is likewise approved. Notice of time of presenting the petition for supersedeas is waived.

This 31st day of May, 1934.

H. P. Adair, Robert A. Baker, August G. Gutheim, C. G. Ashby, Attorneys for Brooks-Scanlon Corporation, Cummer Cypress Company and Wilson Cypress Company.

[fol. 1268] The foregoing bond, the original of which is executed by the Atlantic Coast Line Railroad Company, is approved as to form and substance, as to surety and as to the penal sum thereof.

The foregoing form of order of supersedeas is likewise approved. Notice of time of presenting the petition for supersedeas is waived.

This 31st day of May, 1934.

J. V. Norman, Attorney for Wilson Lumber Company of Florida.

[fol. 1269] The foregoing bond, the original of which is executed by the Atlantic Coast Line Railroad Company, is approved as to form and substance, as to surety and as to the penal sum thereof.

The foregoing form of order of supersedeas is likewise approved. Notice of time of presenting the petition for supersedeas is waived.

This 30th day of May, 1934.

Theo. T. Turnbull, Attorney, Florida Railroad Commission.

[fols. 1270 & 1271] The foregoing bond, the original of which is executed by the Atlantic Coast Line Railroad Company, is approved as to form and substance, as to surety and as to the penal sum thereof.

The foregoing form of order of supersedeas is likewise approved. Notice of time of presenting the petition for supersedeas is waived.

This 30 day of May, 1934.

Cary D. Landis, Attorney-General, State of Florida.

[fol. 1272] IN UNITED STATES DISTRICT COURT

No. 514

Consolidated Cause in Equity

[Title omitted]

MOTION FOR EXTENSION OF TIME TO PERFECT RECORD—Filed June 6, 1934

Comes now Atlantic Coast Line Railroad Company, one of the defendants in the above entitled cause, and with leave of Court first had files this its motion and shows as follows:

1

That on the 19th day of May, 1934, petitioner's appeal from the decree entered in this Court April 17, 1934, was duly allowed and entered. Citation has been issued requiring the appellees to appear in the Supreme Court within forty (40) days from the date thereof, to-wit, the 28th day of June, 1934.

2

Petitioner shows that the record in this cause is voluminous and it is impracticable to perfect said record and print the same within the time allowed by the rules of this Court and the Supreme Court of the United States.

Wherefore, petitioner prays that an extension of time be granted it within which to complete the record in this cause.

[fol. 1273] Carl H. Davis, W. E. Kay, Robert C. Alston, Wm. Hart Sibley, Attorneys for Atlantic Coast Line Railroad Company. Alfred P. Thom, Alston, Alston, Foster and Moise, of Counsel.

Notice of intention to file the above and foregoing motion for extension of time is acknowledged; copy of same and proposed order received; we consent to the entry of said order.

This 24 day of May, 1934.

Cary D. Landis, Attorney for the State of Florida.

Theo. T. Turnbull, Attorney for the Florida Rail-

road Commission. H. P. Adair, C. G. Ashby, A. G. Gutheim, Attorney- for Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company.

[fol. 1274] Notice of intention to file the above and foregoing motion for extension of time is acknowledged; copy of same and proposed order received; we consent to the entry of said order.

This 31st day of May, 1934.

J. V. Norman, Attorneys for Wilson Lumber Company of Florida.

[fols. 1275 & 1276] The above and foregoing motion for extension of time within which to complete the record having been presented to me and all parties of record consenting thereto, after consideration thereof, it is ordered that the petitioner, Atlantic Coast Line Railroad Company, be allowed sixty additional days from the 28th day of June, 1934, within which to compile and complete the record in this cause for appeal to the Supreme Court of the United States.

Dated this 6 day of June, 1934.

Sam'l H. Sibley, United States Circuit Judge. ——, ——, United States District Judge. E. Marvin Underwood, United States District Judge.

Judge Barrett, the remaining member of the Court is ill and out of the State.

[File endorsement omitted.]

[fol. 1277] IN UNITED STATES DISTRICT COURT

No. 514

Consolidated Cause in Equity

MOTION TO TAKE UP ORIGINAL RECORD—Filed June 8, 1934

Comes now Atlantic Coast Line Railroad Company, one of the defendants in the above entitled cause, and with leave of the court first had files this its motion and shows as follows:

1

That on the 19th day of May, 1934, petitioner's appeal from the decree entered in this court April 17, 1934, in this cause was duly allowed and entered. Citation has been duly issued and served.

2

Petitioner further shows that under the provisions of law in such cases made and provided (Urgent Deficiencies Act of October 22, 1913, Chapter 32; 38 Statutes 220; Judicial Code, Sec. 210; 28 U. S. C. A., Par. 47a) "the District Court may direct the original record instead of a transcript thereof to be transmitted on appeal."

3

Petitioner shows that the record in this cause is large and voluminous and that the copying of the same to the end that it be recopied in the Supreme Court is useless and unnecessary.

Wherefore, petitioner prays that an order be entered directing the Clerk of this Court to transmit to the Supreme [fol. 1278] Court of the United States such parts of the original record as may be set out in the præcipe filed by appellant in said appeal; and, in the event a cross appeal is filed by appellees, that the same shall apply to such parts of the record as may be specified by them, or any of them.

Carl H. Davis, W. E. Kay, Robt. C. Alston, Wm. Hart Sibley, Solicitors for Petitioner. Alfred P. Thom, Alston, Alston, Foster & Moise, of Counsel.

[fol. 1279] Notice of intention to file the above and foregoing motion is acknowledged; copy of same and proposed order received; we consent to the entry of said order.

This 30th day of May, 1934.

State of Florida, by Cary D. Landis, Attorney General. Florida Railroad Commission, by Theo. T. Turnbull, Special Attorney. Brooks-Scanlon Corporation, Wilson Cypress Company, Cummer Cypress Company, by H. P. Adair, Robert A. Baker, August G. Gutheim, C. G. Ashby, Their Attorneys. Wilson Lumber Company of Florida, by J. V. Norman, Its Attorney.

[fol. 1280] Notice of intention to file the above and foregoing motion is acknowledged; copy of same and proposed order received; we consent to the entry of said order.

This 5th day of May, 1934.

State of Florida, by Cary D. Landis, Attorney General; by H. E. Carter, Asst. Atty. Gen.

[fol. 1281] Notice of intention to file the above and foregoing motion is acknowledged; copy of same and proposed order received; we consent to the entry of said order.

This 6th day of June, 1934.

Florida Railroad Commission, by Theo. T. Turnbull, Special Attorney.

[fol. 1282] ORDER

The above and foregoing motion to direct the transmittal of the original record to the Supreme Court, in lieu of transcript, having been presented to me and all parties consenting;

It is considered, ordered and decreed that the same be filed and the Clerk of this Court is directed to transmit to the Supreme Court of the United States such parts of the original record as may be specified by appellant, and in the event a cross appeal is filed, such parts of the original record as may be specified by appellees, or any of them, to be used in said appeal in lieu of transcripts; without prejudice to the rights of any party to insist in said Supreme Court that any other parts of said record, not so transmitted, are essential to the proper consideration and determination of said appeal or cross appeal by said Supreme Court.

Dated this 8 day of June, 1934.

Sam'l H. Sibley, U. S. Circuit Judge. E. Marvin Underwood, Judge United States District Court.

[File endorsement omitted.]

[fol. 1283] IN UNITED STATES DISTRICT COURT

No. 514

Consolidated Cause in Equity

[Title omitted.]

NOTICE OF APPEAL—Filed June 9, 1934

To State of Florida and E. S. Matthews, Mamie Eaton-Greene, and W. B. Douglass, as and constituting the Florida Railroad Commission; Brooks-Scanlon Corporation; Cummer Cypress Company, Wilson Cypress Company, Wilson Lumber Company of Florida; E. S. Matthews, Mamie Eaton-Greene and W. B. Douglass, as and constituting the Florida Railroad Commission, for the use and benefit of the several shippers named in paragraph III of the final decree of restitution; The Honorable the Attorney General of the State of Florida; and/or The Honorable Attorney General of the State of Georgia:

Please take notice that by order of the above entitled Court made and entered the 19th day of May, 1934, separate appeal to the Supreme Court of the United States by the Atlantic Coast Line Railroad Company, one of the defendants in the above entitled consolidated cause, has been taken and allowed.

Carl H. Davis, W. E. Kay, Robert C. Alston, Wm. Hart Sibley, Attorneys for Atlantic Coast Line Railroad Company, Appellant. Alfred P. Thom, Alston, Alston, Foster & Moise, of Counsel.

[fols. 1284 & 1285] Received a copy of the foregoing notice, this 24th day of May, 1934.

State of Florida, by Cary D. Landis, Attorney General. Florida Railroad Commission, by Theo. T. Turnbull, Its Attorney. Brooks-Scanlon Corporation, Cummer Cypress Company, Wilson Cypress Company, by H. P. Adair, August G. Gutheim, Robert A. Baker, C. G. Ashby, Their Attorneys. Wilson Lumber Company of Florida, by J. V. Norman, Its Attorney. State of Georgia, by M. J. Yeomans, Attorney General.

[File endorsement omitted.]

[fol. 1286] IN UNITED STATES DISTRICT COURT

In Equity.

Nos. 511, 512 and 514

[Title omitted]

STIPULATION AS TO USE OF U. S. SUPREME COURT RECORD—Filed June 12, 1934

It is stipulated that any of the parties at interest in this cause may on any appeal which may be taken in this cause, to the Supreme Court of the United States, as to any claim for restitution against the Atlantic Coast Line Railroad Company, may use the printed transcript of record in the case of State of Florida et al. versus United States of America et al. and companion cases Nos. 16, 17 and 18, October Term, 1930, in the Supreme Court of the United States, the opinion in which is reported in 282 U. S. 184, et seq., as a part of the record upon such appeal; and that the same may be transmitted to the Supreme Court of the United States instead of a transcript thereof; and that the record filed with the Clerk of the Supreme Court of the United States in said cause may be used on appeal as though an original record in said cause.

This July 26, 1933.

Cary D. Landis, Attorney General of the State of Florida. T. T. Turnbull, Special Counsel, Florida Railroad Commission. H. P. Adair, C. G. Ashby, August G. Gutheim, J. V. Norman, R. H. Baker, of Counsel for Wilson Cypress Co., Wilson Lumber Company of Florida, Brooks-Scanlon Corporation. F. B. Grier, Carl H. Davis, W. E. Kay, Alston, Alston, Foster & Moise, Attorneys for A. C. L. R. R.

[fol. 1287] [File endorsement omitted.]

[fol. 1288] IN UNITED STATES DISTRICT COURT

No. 514

Consolidated Cause in Equity

[Title omitted]

PRÆCIPE FOR RECORD—Filed June 25, 1934

The Clerk of this Court is hereby directed to certify the following portions of the original record in the above entitled cause, for the use of the Supreme Court of the United States on this appeal, to-wit:

1. The three mandates of the Supreme Court of the United States in the constituent causes, styled

Brooks-Scanlon Corporation et al. vs. United States of America et al., No. 511;
Wilson Lumber Company of Florida vs. United States of America et al., No. 512; and
State of Florida et al. vs. United States of America et al., No. 514;

received in the Clerk's office February 19, 1931, entered and filed March 7, 1931.

2. The motions of complainants in each of the above entitled causes for decrees in accordance with the mandates, filed February 28, 1931, in causes 511 and 514, and filed March 2, 1931, in cause No. 512.

[fol. 1289] 3. Amendments to complainants' motions for decree in accordance with mandates, filed March 7, 1931.

4. Responses of Atlantic Coast Line Railroad Company to complainants' motions, filed March 7, 1931.

5. Motions of complainants to strike or dismiss responses of Atlantic Coast Line Railroad Company, filed March 7, 1931.

6. Orders making the mandates the judgments of the United States District Court in each of the constituent causes entered and filed March 7, 1931.

7. First amendments to the responses of the Atlantic Coast Line Railroad Company, filed March 17, 1931.

8. Motions by complainants to strike or dismiss amendments to responses of Atlantic Coast Line Railroad Company, filed March 20, 1931.

9. Second amendments to responses of Atlantic Coast Line Railroad Company, filed April 15, 1931.

10. Motions of complainants to strike or dismiss second amendments to responses of Atlantic Coast Line Railroad Company, filed April 21, 1931.

11. Orders of the United States District Court referring the causes to a Special Master, entered and filed July 31, 1931, and minute entries directing that the three constituent causes be consolidated for the purposes of hearing.

12. Application and petition of the Special Master for instructions, filed February 17, 1932.

13. Order and opinion of the United States District Court on the petition of the Special Master for instructions and order of re-reference, entered and filed March 18, 1932.

[fol. 1290] 14. First report of the Special Master, filed November 14, 1932.

15. Exceptions of the Atlantic Coast Line Railroad Company to the Master's report, filed in each of the constituent causes November 30, 1932.

16. Motions of complainants to set aside or re-refer the matter to the Master, filed December 13, 1932.

17. Complainants' exceptions to the Master's report in each of the three constituent causes, filed December 5, 1932.

18. Motions of the Atlantic Coast Line Railroad Company to strike the exceptions of complainants, filed December 9, 1932.

19. Opinion of the United States District Court on the exceptions to the Master's report, filed January 30, 1933.

20. Order of the United States District Court overruling all exceptions to the Master's report and order for a re-reference, entered and filed January 30, 1933.

21. Petitions of the Atlantic Coast Line Railroad Company filed in the constituent causes for a decree on the Master's report or that the cause be held in abeyance until action by the Interstate Commerce Commission can be had, filed as of the 15 day of March, 1933.

22. Motions of the complainants to strike the petitions of the Atlantic Coast Line Railroad Company, filed March 21, 1933.

23. Order of the United States District Court denying the prayers of the petition of Atlantic Coast Line Railroad Company, entered and filed March 22, 1933.

[fol. 1291] 24. Second report of the Special Master, filed November 7, 1933.

25. Exceptions by the Atlantic Coast Line Railroad Company to the Master's report in each of the constituent causes, filed November 25, 1933.

26. Exceptions of Wilson Lumber Company of Florida to the Master's report, filed November 25, 1933.

27. Exceptions to the Master's report by complainants, Brooks-Scanlon Corporation, et al., in No. 511, and by the State of Florida, et al., in No. 514, filed November 27, 1933.

28. Motion of Atlantic Coast Line Railroad Company to file certain exhibits as pleadings, and order thereon, entered and filed December 29, 1933.

29. Answers of the Atlantic Coast Line Railroad Company to the various claims presented in the constituent causes before the Special Master, filed December 29, 1933.

30. Motions of complainants in each of the constituent causes before the Special Master to strike the answers of the Atlantic Coast Line Railroad Company, filed December 29, 1933.

31. Opinion of the United States District Court on hearing of exceptions to the Master's report, entered and filed January 26, 1934.

32. Motion of Atlantic Coast Line Railroad Company in each of the constituent causes, to modify the opinion and order thereon, entered and filed March 30, 1934.

33. Amendment to motion of Atlantic Coast Line Railroad Company to modify opinion and order thereon, in each of the constituent causes, entered and filed April 14, 1934.

[fol. 1292] 34. Certified copy of so much of the record of the hearing had before the Special Master on the second order of reference, beginning March 27, 1933, as is contained on pages 1-4, both inclusive.

35. Order of the United States District Court consolidating the constituent causes under the name and style of State of Florida, et al., vs. United States, et al., No. 514, in Equity, entered and filed April 17, 1934.

36. Final decree and judgment in favor of complainants and against Atlantic Coast Line Railroad Company, entered and filed April 17, 1934.

37. Notice of intention to appeal, filed May 19, 1934.

38. Petition for appeal, assignment of errors, prayer for reversal, entered and filed May 19, 1934.

39. Order allowing separate appeal, entered and filed May 19, 1934.

40. Appeal bond, approved, entered and filed May 19, 1934.

41. Statement as to jurisdiction and acknowledgment of service in accordance with Rule 12 of the Supreme Court of the United States, filed May 19, 1934.

42. Citation with acknowledgment of service thereon, filed May 19, 1934.

43. Notice of intention to file motion for summons and severance of co-defendants, dated May 16, 1934, filed June 4, 1934.

44. Motion for severance and order thereon, entered and filed June 4, 1934.

[fol. 1293] 45. Petition for supersedeas on appeal and order of Mister Associate Justice Harlan F. Stone, entered and filed June 7, 1934.

46. Motion for extension of time to perfect record, and order thereon, filed June 6, 1934.

47. Motion to take up original record, and order thereon filed June 8, 1934.

48. Notice of appeal, filed June 9, 1934.

49. Stipulation between counsel of record, dated July 26, 1933, filed June 12, 1934.

50. This præcipe for original record, all acknowledgments of receipt of copies, acknowledgments of service and waivers signed by attorneys of record in this cause.

This 25 day of June, 1934.

Carl H. Davis, W. E. Kay, Alston, Alston, Foster & Moise, Solicitors for Atlantic Coast Line Railroad Company, Appellant. Alfred P. Thom, Alston, Alston, Foster & Moise, of Counsel.

[fol. 1294] [File endorsement omitted.]

[fol. 1295] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

No. 514

Consolidated Cause in Equity

[Title omitted]

NOTICE OF PRÆCIPE—Filed July 11, 1934

To State of Florida and E. S. Matthews, Mamie Eaton-Greene, and W. B. Douglass, as and Constituting the Florida Railroad Commission; Brooks-Scanlon Corporation; Cummer Cypress Company; Wilson Cypress Company; Wilson Lumber Company of Florida; and E. S. Matthews, Mamie Eaton-Greene and W. B. Douglass, as and constituting the Florida Railroad Commission, for the use and benefit of the several shippers named in paragraph III of the final decree of restitution, or their attorneys of record:

Please take notice that on the 25th day of June, 1934, the undersigned filed with the Clerk of this Court a præcipe for the record to be transmitted to the Supreme Court of the United States on the appeal taken in the above cause, a copy of which præcipe is herewith served on you.

This 25th day of June, 1934.

Carl H. Davis, W. E. Kay, Alston, Alston, Foster & Moise, Solicitors for Atlantic Coast Line Railroad Company, Appellant. Alfred P. Thom, Alston, Alston, Foster & Moise, of Counsel.

[fol. 1296] Service of the within notice and copy of the præcipe is hereby accepted. All other and further service and notice is hereby waived.

This 27th day of June, 1934.

State of Florida, Cary D. Landis, Attorney General. E. S. Matthews, Mamie Eaton-Greene and W. B. Douglass, as and Constituting the Florida Railroad Commission, by Theo. T. Turnbull, Special Attorney.

[fol. 1297] Service of the within notice and copy of the præcipe is hereby accepted. All other and further service and notice is hereby waived.

This 27th day of June, 1934.

Wilson Lumber Company of Florida, by J. V. Norman, Its Attorney.

[fols. 1298–1300] Service of the within notice and copy of the præcipe is hereby accepted. All other and further service and notice is hereby waived.

This 27th day of June, 1934.

Brooks-Scanlon Corporation, by R. A. Baker, Its Attorney. Cummer Cypress Company, by H. P. Adair, C. G. Ashby, August G. Gutheim, Its Attorneys. Wilson Cypress Company, by H. P. Adair, C. G. Ashby, August G. Gutheim, Its Attorneys.

[fols. 1301 & 1302] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 1303] In United States District Court

No. 511, No. 512, No. 514

[Titles omitted]

Certificate of Horace M. Holden, Special Master Appointed by the Court in the Above Stated Cases—Filed December 4, 1933

The undersigned, Horace M. Holden, Special Master heretofore appointed by the Court in the above stated cases does hereby certify that the evidence which he has transmitted to the Court and filed in the office of the Clerk there-
[fol. 1304] of constitutes the entire evidence taken by him as such Master in both the original reference and re-reference.

Witness the hand and official signature of Horace M. Holden, Special Master as aforesaid, this 4 day of December, 1933.

Horace M. Holden, Special Master.

[File endorsement omitted.]

[fol. 1305] IN UNITED STATES DISTRICT COURT

Consolidated Cause No. 514

[Title omitted]

PETITION FOR CROSS APPEAL—Filed June 12, 1934

Come now the State of Florida and E. S. Matthews, Mamie Eaton-Greene and W. B. Douglass, as and constituting the Florida Railroad Commission, complainants in Constituent Cause Number 514 above, Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company, complainants in Constituent Cause Number 511, and Wilson Lumber Company of Florida, complainant in Constituent Cause Number 512, and represent unto the Court that Atlantic Coast Line Railroad Company, a defendant in the above entitled consolidated cause, has been allowed an appeal from the final decree dated April 14, [fols. 1306 & 1307] 1934, and entered and filed April 17, 1934, in said consolidated cause, and said complainants, jointly and separately, feeling themselves also aggrieved by said final decree of the above entitled Court in the above entitled consolidated cause, do jointly and separately pray that a cross-appeal to the Supreme Court of the United States be allowed to them jointly and separately from said final decree, and that citation be issued as provided by law, for the reasons stated in the assignments of errors filed herewith;

And that a transcript of the record (or the original record, as the case may be) heretofore ordered to be filed in connection with the appeal of the defendant Atlantic Coast Line Railroad Company, be used in the consideration of this cross-appeal, the complainants being only required to add or cause to be added to such transcript (or original record, as the case may be) such papers as pertain to this their cross-appeal.

Cary D. Landis, Attorney General of the State of Florida; Theo. T. Turnbull, Special Counsel for Florida Railroad Commission; H. P. Adair, August G. Gutheim, R. A. Baker, C. G. Ashby, Solicitors for Complainants, Brooks-Scanlon Corporation, Wilson Cypress Company, and Cummer Cypress Company; J. V. Norman, Solicitor for Wilson Lumber Company of Florida.

[File endorsement omitted.]

[fol. 1308] IN UNITED STATES DISTRICT COURT IN AND FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

In Equity

Consolidated Cause No. 514

STATE OF FLORIDA and E. S. MATTHEWS, MAMIE EATON-GREENE, and W. B. DOUGLASS, as and constituting the Florida Railroad Commission; Brooks-Scanlon Corporation, Cummer Cypress Company, Wilson Cypress Company and Wilson Lumber Company of Florida; and E. S. Matthews, Mamie Eaton-Greene and W. B. Douglass, as and constituting the Florida Railroad Commission, for the use and benefit of the several shippers named in paragraph III of the final decree of restitution, Complainants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, Atlantic Coast Line Railroad Company, et al., Defendants

ORDER GRANTING CROSS-APPEAL—Filed June 12, 1934

The State of Florida and E. S. Matthews, Mamie Eaton-Greene and W. B. Douglass, as and constituting the Florida Railroad Commission, complainants in Constituent Cause Number 514 above, Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company, complainants in Constituent Cause Number 511, and Wilson Lumber Company of Florida, complainant in Constituent Cause Number 512, having filed their joint and separate petition for cross-appeal from the final decree dated April 14, 1934, and entered April 17, 1934, in the above entitled consolidated cause, and having likewise filed their separate assignments of errors, and jointly and severally presented a typewritten statement of the basis upon which they [fols. 1309 & 1310] jointly and severally contend that the Supreme Court of the United States has jurisdiction upon appeal to review the said final decree, upon consideration,

It is ordered that said petition for cross-appeal be and the same is hereby granted, and the said complainants are hereby allowed jointly and separately to appeal from said final decree in the above entitled consolidated cause.

It is further ordered that said cross-appeal be and the same is hereby entered to the Supreme Court of the United States upon the filing of a bond by the complainants in the sum of one thousand dollars, with good and sufficient surety, to be approved by this Court, conditioned upon the said complainants prosecuting said appeal to effect and answering all costs if they fail to make their plea good.

It is further ordered that the transcript of the record (or the original record, as the case may be) heretofore ordered to be filed in connection with the appeal of the defendant Atlantic Coast Line Railroad Company, be used in the consideration of this cross-appeal, the complainants being only required to add or cause to be added to such transcript (or the original record, as the case may be) such papers as pertain to this their cross-appeal.

Done and ordered this 12 day of June, A. D. 1934.

Sam'l H. Sibley, United States Circuit Judge; Bascom S. Deaver, United States District Judge. Halsted L. Ritter, United States District Judge.

[File endorsement omitted.]

[fol. 1311] IN UNITED STATES DISTRICT COURT

Consolidated Cause No. 514

[Title omitted]

NOTICE OF CROSS-APPEAL—Filed June 12, 1934

To: The United States of America, Interstate Commerce Commission, Georgia Public Service Commission, and Atlantic Coast Line Railroad Company, Defendants; and The Honorable The Attorney General of the State of Georgia:

Please take notice that by order of the above entitled Court, made and entered June 12, 1934, joint and separate cross-appeal to the Supreme Court of the United States by the State of Florida, and E. S. Matthews, Mamie Eaton-Greene and W. B. Douglass, as and constituting the Florida Railroad Commission, complainants in Constituent Cause Number 514, Brooks-Scanlon Corporation, Wilson Cypress

Company and Cummer Cypress Company, complainants in Constituent Cause Number 511, and Wilson Lumber Company of Florida, complainant in Constituent Cause Number 512, has been taken and allowed in the above entitled [fols. 1312 & 1313] consolidated cause.

Cary D. Landis, Attorney General of the State of Florida; Theo. T. Turnbull, Special Counsel for Florida Railroad Commission; H. P. Adair, August G. Gutheim, R. A. Baker, C. G. Ashby, Solicitors for Complainants, Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company; J. V. Norman, Solicitor for Wilson Lumber Company of Florida.

Received a copy of the foregoing notice this 12 day of June, A. D. 1934.

Carl H. Davis, W. E. Kay, Robert C. Alston, Wm. Hart Sibley, Attys. for Atlantic Coast Line Rd. Co.; The Georgia Public Service Commission, by John T. Gorce, Asst. Atty. Gen., M. J. Yeomans, Atty. General of Ga.

P. O. Address: 112 State Capital, Atlanta, Ga.

[File endorsement omitted.]

[fols. 1314-1319] Citation in usual form showing service on Elmer M. Collins et al., filed June 12, 1934, omitted in printing.

[fols. 1320-1324] Bond on Cross-appeal for $1,000.00, approved and filed June 12, 1934, omitted in printing.

[fol. 1325] IN UNITED STATES DISTRICT COURT

Consolidated Cause No. 514

[Title omitted]

SEPARATE ASSIGNMENT OF ERRORS OF THE STATE OF FLORIDA AND E. S. MATTHEWS, MAMIE EATON-GREENE AND W. B. DOUGLASS, AS AND CONSTITUTING THE FLORIDA RAILROAD COMMISSION, ON CROSS-APPEAL—Filed June 12, 1934

The State of Florida and E. S. Matthews, Mamie Eaton-Greene and W. B. Douglass, as and constituting the Florida Railroad Commission, complainants in constituent cause No. 514, by their undersigned counsel, come now, and in connection with their petition for cross-appeal herein file the following separate assignment of errors on which they will rely on their said appeal to the Supreme Court of the United States from the final order or decree of the District Court herein dated April 14, 1934, and filed April 17, 1934.

[fol. 1326] The District Court erred:

1. In denying to the complainants on behalf of the several shippers named in paragraph III of the final decree of restitution respectively, in its orders and decrees filed April 17, 1934, January 26, 1934, January 30, 1933, March 18, 1932, and July 31, 1931, respectively, restitution of the amounts paid by said shippers respectively to the defendant, Atlantic Coast Line Railroad Company, because of the erroneous decrees entered herein prior to March 7, 1931, by said Court.

2. In denying, in its orders and decrees filed April 17, 1934, January 26, 1934, January 30, 1933, March 18, 1932 and July 31, 1931, respectively, to the complainants, on behalf of the several shippers named in paragraph III of the final decree of restitution, restitution of the difference between the amounts paid by said shippers respectively to the Atlantic Coast Line Railroad for the transportation of logs in Florida in intrastate commerce under the scale of rates prescribed by the unlawful and invalid order of the Interstate Commerce Commission sustained herein by the erroneous decrees of said Court and the amounts which would have been paid by them respectively for such transportation service under the scale of State rates which was established

and maintained subject to the authority of the State of Florida and published as required by its laws and which was in force and effect for such transportation service in Florida when said unlawful and invalid order of the Interstate Commerce Commission became effective and which the said unlawful and invalid order of the Interstate Commerce Commission purported to supersede.

[fol. 1327] 3. In failing and refusing, in its orders and decrees filed April 17, 1934, January 26, 1934, January 30, 1933, March 18, 1932, and July 31, 1931, respectively, to restore to the complainants, on behalf of the several shippers named in paragraph III of the final decree of restitution, respectively, the benefits derived and received by the defendant, Atlantic Coast Line Railroad Company, from said shippers under and by reason of the erroneous decrees of said Court.

4. In holding, in its orders and decrees filed April 17, 1934, January 26, 1934, and January 30, 1933, respectively, that the Cummer Scale of rates was not the lawful established rate in Florida applicable to the shipments of logs here involved because unremunerative and confiscatory.

5. In holding, in its orders and decrees filed April 17, 1934, January 26, 1934, and January 30, 1933, respectively, that the Cummer Scale of rates was unreasonable and unjust.

6. In holding, in its orders and decrees filed April 17, 1934, January 26, 1934, and January 30, 1933, respectively, that the Cummer Scale of rates was unremunerative and confiscatory.

7. In holding, in its orders and decrees filed April 17, 1934, January 26, 1934, January 30, 1933, March 18, 1932, and July 31, 1931, respectively, that inquiry could be made on the proceedings for restitution herein as to whether or not the Cummer Scale of rates was reasonable or unreasonable, just or unjust, confiscatory or remunerative.

8. In receiving, by its orders and decrees filed April 17, 1934, January 26, 1934, January 30, 1933, and March 18, 1932, respectively, over the objection of the complainants, evidence herein in connection with the restitution sought by the complainants as to whether or not the Cummer Scale

[fol. 1328] of rates was reasonable or unreasonable, just or unjust, confiscatory or remunerative.

9. In holding, in its orders and decrees filed April 17, 1934, and January 26, 1934, respectively, that in applying the common law standard of reasonableness upon the issue of quantum meruit, in establishing the fair and reasonable charge to be made for the past shipments here involved, the State Statutes, which control the making of future intrastate rates, should be regarded.

10. In holding, in its orders and decrees filed April 17, 1934, and January 26, 1934, respectively, that in applying said common law standard, in establishing the fair and reasonable charge to be made for the past shipments here involved, the Federal Statutes, which control the making of future intrastate rates, should be regarded.

11. In holding, in its orders and decrees filed April 17, 1934, and January 26, 1934, respectively, that in applying said common law standard "the Florida law prohibits discrimination by common carrier".

12. In failing and refusing to hold, in its orders and decrees filed April 17, 1934, and January 26, 1934, respectively, that in applying said common law standard, the only kind of discrimination prohibited by Florida law for common carriers is unjust discrimination.

13. In holding, in its orders and decrees filed April 17, 1934, and January 26, 1934, respectively, that in applying said common law standard "discrimination ought to be avoided not only in fixing future rates but as far as practicable in measuring compensation for past services.".

14. In holding, in its orders and decrees filed April 17, 1934, and January 26, 1934, respectively, that in applying said common law standard the Federal law aimed at discrimination by State rates against Interstate Commerce is a matter which has any bearing on the restitution here sought.

[fol. 1329] 15. In finding, in its orders and decrees filed April 17, 1934, and January 26, 1934, respectively, that, in applying said common law standard, the complainants, on behalf of the several shippers named in paragraph III of the final decree of restitution, respectively, are entitled to

no more than the principal sum allowed them respectively in said decree with interest as specified in said decree.

16. In failing and refusing to find, in its orders and decrees filed April 17, 1934, and January 26, 1934, respectively, that, in applying said common law standard, a reasonable charge for the transportation service rendered to said shippers named in paragraph III of said final decree of restitution, respectively, was a charge which in each instance would result in the recovery by and on behalf of said complainants, on behalf of said shippers, respectively, of a sum greater than the sum allowed said complainants respectively in and by said final decree but not exceeding the amount of overcharge claimed by said shippers respectively.

17. In failing and refusing to find, in its orders and decrees filed April 17, 1934, and January 26, 1934, respectively, that in applying said common law standard, a reasonable charge for the transportation service rendered to said shippers named in paragraph III of said final decree of restitution, respectively, was a charge which in each instance would result in the recovery by and on behalf of said complainants, on behalf of said shippers, respectively, of the amount of overcharge claimed by said shippers respectively.

[fols. 1330 & 1331] Wherefore, the said complainants pray that the Supreme Court of the United States for the reasons severally set forth in the foregoing assignments do adjudge that the complainants on behalf of the several shippers named in paragraph III of the final decree of restitution are entitled to have restitution measured by the Cummer Scale, and that if the said Supreme Court of the United States shall adjudge that the Cummer Scale is not the measure which ought to be employed, then that it do adjudge that the complainants on behalf of said several shippers are respectively entitled to restitution measured by said common law standard as was found by the District Court, but do adjudge that for the reasons set forth in the foregoing assignments the amounts awarded to said complainants on behalf of said several shippers are in each instance inadequate in law and under the facts of the case; and that said Final Decree of the District Court filed April 17, 1934, be reversed and modified to accord with such judg-

ment as the Supreme Court shall render and such decree be rendered as ought to have been rendered by the District Court and that the complainants have such other and further relief as may be proper in the premises.

Cary D. Landis, Attorney General of the State of Florida; Theo. T. Turnbull, Special Counsel for the Florida Railroad Commission.

[File endorsement omitted.]

[fol. 1332] IN UNITED STATES DISTRICT COURT

Consolidated Cause No. 514

[Title omitted]

SEPARATE ASSIGNMENT OF ERRORS OF BROOKS-SCANLON CORPORATION, WILSON CYPRESS COMPANY AND CUMMER CYPRESS COMPANY ON CROSS-APPEAL—Filed June 12, 1934

Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company, complainants in constituent cause No. 511, by their undersigned counsel, come now, jointly and severally, and in connection with their petition for cross-appeal herein file the following separate assign-
[fol. 1333] ment of errors on which they will rely on their said appeal to the Supreme Court of the United States from the final order or decree of the District Court herein dated April 14, 1934, and filed April 17, 1934.

And said Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company jointly say, and each of them, severing from the other, separately and severally says, that the District Court erred;

1. In denying to the complainants respectively, in its orders and decrees filed April 17, 1934, January 26, 1934, January 30, 1933, March 18, 1932 and July 31, 1931, respectively, restitution of the amounts paid by the complainants respectively to the defendant, Atlantic Coast Line Railroad Company because of the erroneous decrees entered herein prior to March 7, 1931, by said Court.

2. In denying, in its orders and decrees filed April 17, 1934, January 26, 1934, January 30, 1933, March 18, 1932,

and July 31, 1931, respectively, to the complainants restitution of the difference between the amounts paid by them respectively to the Atlantic Coast Line Railroad for the transportation of logs in Florida in intrastate commerce under the scale of rates prescribed by the unlawful and invalid order of the Interstate Commeree Commission sustained herein by the erroneous decrees of said Court and the amounts which would have been paid by them respectively for such transportation service under the scale of State rates which was established and maintained subject to the authority of the State of Florida and published as required by its laws and which was in force and effect for such transportation service in Florida when said unlawful and invalid order of the Interstate Commerce Commission [fol. 1334] became effective and which the said unlawful and invalid order of the Interstate Commerce Commission purported to supersede.

3. In failing and refusing, in its orders and decrees filed April 17, 1934, January 26, 1934, January 30, 1933, March 18, 1932 and July 31, 1931, respectively, to restore to the complainants respectively the benefits derived and received by the defendant, Atlantic Coast Line Railroad Company, from said complainants under and by reason of the erroneous decrees of said Court.

4. In holding, in its orders and decrees filed April 17, 1934, January 26, 1934 and January 30, 1933, respectively, that the Cummer Scale of rates was not the lawful established rate in Florida applicable to the shipments of logs here involved because unremunerative and confiscatory.

5. In holding, in its orders and decrees filed April 17, 1934, January 26, 1934 and January 30, 1933, respectively, that the Cummer Scale of rates was unreasonable and unjust.

6. In holding, in its orders and decrees filed April 17, 1934, January 26, 1934 and January 30, 1933, respectively, that the Cummer Scale of rates was unremunerative and confiscatory.

7. In holding, in its orders and decrees filed April 17, 1934, January 26, 1934, January 30, 1933, March 18, 1932 and July 31, 1931, respectively, that inquiry could be made on the proceedings for restitution herein as to whether or

not the Cummer Scale of rates was reasonable or unreasonable, just or unjust, confiscatory or remunerative.

8. In receiving, by it orders and decrees filed April 17, 1934, January 26, 1934, January 30, 1933, and March 18, 1932, respectively, over the objection of the complainants, [fol. 1335] evidence herein in connection with the restitution sought by the complainants as to whether or not the Cummer Scale of rates was reasonable or unreasonable, just or unjust, confiscatory or remunerative.

9. In holding, in its orders and decrees filed April 17, 1934, January 26, 1934, and January 30, 1933, respectively, that the evidence with respect to the circumstances and conditions and costs of the movement of the logs consigned from Hines, Florida, to Wilson Cypress Company at Palatka, Florida, was such as to overcome the prima facie presumption of justness and reasonableness of the Cummer Scale of rates which the District Court found to exist under Florida law.

10. In holding, in its orders and decrees filed April 17, 1934, January 26, 1934, and January 30, 1933, respectively, that the evidence with respect to the circumstances and conditions and costs of the movement of the logs consigned from Homosassa, Florida, to Cummer Cypress Company at Lacoochee, Florida, was such as to overcome the prima facie presumption of justness and reasonableness of the Cummer Scale of rates which the District Court found to exist under Florida law.

11. In holding, in its orders and decrees filed April 17, 1934, January 26, 1934 and January 30, 1933, respectively, that the evidence with respect to the circumstances and conditions and costs of the movement of the logs consigned from Carbur and Perry, Florida, to Brooks-Scanlon Corporation at Eastport, Florida, was such as to overcome the prima facie presumption of justness and reasonableness of the Cummer Scale of rates which the District Court found to exist under Florida law.

[fol. 1336] 12. In holding, in its orders and decrees filed April 17, 1934 and January 26, 1934, respectively, that in applying the common law standard of reasonableness upon the issue of quantum meruit, in establishing the fair and reasonable charge to be made for the past shipments here

involved, the State Statutues, which control the making of future intrastate rates, should be regarded.

13. In holding, in its orders and decrees filed April 17, 1934, and January 26, 1934, respectively, that in applying said common law standard, in establishing the fair and reasonable charge to be made for the past shipments here involved, the Federal Statutes, which control the making of future intrastate rates, should be regarded.

14. In holding, in its orders and decrees filed April 17 1934 and January 26, 1934, respectively, that in applying said common law standard "the Florida law prohibits discrimination by common carriers".

15. In failing and refusing to hold, in its orders and decrees filed April 17, 1934 and January 26, 1934, respectively, that in applying said common law standard, the only kind of discrimination prohibited by Florida law for common carriers is unjust discrimination.

16. In holding, in its orders and decrees filed April 17, 1934 and January 26, 1934, respectively, that in applying said common law standard "discrimination ought to be avoided not only in fixing future rates but as far as practicable in measuring compensation for past services".

[fol. 1337] 17. In holding, in its orders and decrees filed April 17, 1934, and January 26, 1934, respectively, that in applying said common law standard the Federal law aimed at discrimination by State rates against Interstate Commerce is a matter which has any bearing on the restitution here sought.

18. In holding, in its orders and decrees filed April 17, 1934 and January 26, 1934, respectively, that in applying said common law standard, a uniform charge for carload shipments ought to be applied to all of the claims for restitution here involved.

19. In failing and refusing to determine, in its orders and decrees filed April 17, 1934, and January 26, 1934, respectively, in applying said common law standard, the reasonable charge for each transportation service here involved under the particular circumstances and conditions of each such transportation service.

20. In determining, in its orders and decrees filed April 17, 1934, and January 26, 1934, respectively, in applying

said common law standard, an equal or uniform charge for the various transportation services here involved while recognizing differences in the conditions and circumstances of such transportation services.

21. In finding, in its orders and decrees filed April 17, 1934, and January 26, 1934, respectively, that in applying said common law standard, the complainants respectively are entitled to no more than the principal sum allowed them respectively in said decree with interest as specified in said decree.

22. In failing and refusing to find, in its orders and decreees filed April 17, 1934 and January 26, 1934, respectively, that, in applying said common law standard, a rea-
[fol. 1338] sonable charge for the transportation service rendered to said complainants respectively was a charge which in each instance would result in the recovery by and on behalf of each of said complainants respectively of a sum greater than the sum allowed said complainants respectively in and by said final decree but not exceeding the amount of overcharge claimed by such complainants respectively.

23. In failing and refusing to find, in its orders and decrees filed April 17, 1934, and January 26, 1934, respectively, that, in applying said common law standard, a reasonable charge for the transportation service rendered to said complainants respectively was a charge which in each instance would result in the recovery by and on behalf of each of said complainants respectively of the amount of overcharge claimed by such complainants respectively.

Wherefore, the said complainants, jointly and severally, pray that the Supreme Court of the United States for the reasons severally set forth in the foregoing assignments do adjudge that the complainants severally are entitled to have restitution measured by the Cummer Scale, and that if the said Supreme Court of the United States shall adjudge that the Cummer Scale is not the measure which ought to be employed, then that it do adjudge that the complainants are respectively entitled to restitution measured by said common law standard as was found by the District Court, but do adjudge that for the reasons set forth in the foregoing assignments the amounts awarded to said com-
[fols. 1339 & 1340] plainants respectively are in each in-

stance inadequate in law and under the facts of the case; and that said Final Decree of the District Court filed April 17, 1934, be reversed and modified to accord with such judgment as the Supreme Court shall render, and such decree be rendered as ought to have been rendered by the District Court and that the complainants have such other and further relief as may be proper in the premises.

H. P. Adair, August G. Gutheim, R. A. Baker, C. G. Ashby, Solicitors for said Complainants.

[File endorsement omitted.]

[fol. 1341] IN UNITED STATES DISTRICT COURT

Consolidated Cause No. 514

[Title omitted]

SEPARATE ASSIGNMENT OF ERRORS OF WILSON LUMBER COMPANY OF FLORIDA ON CROSS-APPEAL—Filed June 12, 1934

Wilson Lumber Company of Florida, complainant in constituent cause No. 512, by its undersigned counsel, comes now, and in connection with its petition for cross-appeal herein files the following separate assignment of errors on which it will rely on its said appeal to the Supreme Court of the United States from the final order or decree of the District Court herein dated April 14, 1934, and filed April 17, 1934.

[fol. 1342] The District Court erred:

1. In denying to the complainant, in its orders and decrees filed April 17, 1934, January 26, 1934, January 30, 1933, March 18, 1932, and July 31, 1931, respectively, restitution of the amounts paid by the complainant to the defendant, Atlantic Coast Line Railroad Company because of the erroneous decrees entered herein prior to March 7, 1931, by said Court.

2. In denying, in its orders and decrees filed April 17, 1934, January 26, 1934, January 30, 1933, March 18, 1932, and July 31, 1931, respectively, to the complainant restitution of the difference between the amounts paid by it to the Atlantic Coast Line Railroad for the transportation of logs in Florida in intrastate commerce under the scale of rates prescribed by the unlawful and invalid order of the Inter-

state Commerce Commission sustained herein by the erroneous decrees of said Court and the amounts which would have been paid by it for such transportation service under the scale of State rates which was established and maintained subject to the authority of the State of Florida and published as required by its laws and which was in force and effect for such transportation service in Florida when said unlawful and invalid order of the Interstate Commerce Commission became effective and which the said unlawful and invalid order of the Interstate Commerce Commission purported to supersede.

3. In failing and refusing, in its orders and decrees filed April 17, 1934, January 26, 1934, January 30, 1933, March 18, 1932, and July 31, 1931, respectively, to restore to the complainant the benefits derived and received by the defendant, Atlantic Coast Line Railroad Company, from said complainant under and by reason of the erroneous decrees of said Court.

[fol. 1343] 4. In holding, in its orders and decrees filed April 17, 1934, January 26, 1934 and January 30, 1933, respectively, that the Cummer Scale of rates was not the lawful established rate in Florida applicable to the shipments of logs here involved because unremunerative and confiscatory.

5. In holding, in its orders and decrees filed April 17, 1934, January 26, 1934 and January 30, 1933, respectively, that the Cummer Scale of rates was unreasonable and unjust.

6. In holding, in its orders and decrees filed April 17, 1934, January 26, 1934 and January 30, 1933, respectively, that the Cummer Scale of rates was unremunerative and confiscatory.

7. In holding, in its orders and decrees filed January 26, 1934, January 30, 1933, March 18, 1932 and July 31, 1931, respectively, that inquiry could be made on the proceedings for restitution herein as to whether or not the Cummer Scale of rates was reasonable or unreasonable, just or unjust, confiscatory or remunerative.

8. In receiving, by its orders and decrees filed April 17, 1934, January 26, 1934, January 30, 1933 and March 18, 1932, respectively, over the objection of the complainant,

evidence herein in connection with the restitution sought by the complainant as to whether or not the Cummer Scale of rates was reasonable or unreasonable, just or unjust, confiscatory or remunerative.

9. In holding, in its orders and decrees filed April 17th, 1934, January 26, 1934 and January 30, 1933, respectively, that the evidence with respect to the circumstances and con- [fol. 1344] ditions and costs of the movement of the logs consigned to Wilson Lumber Company of Florida at Perry, Florida, was such as to overcome the prima facie presumption of justness and reasonableness of the Cummer Scale of rates which the District Court found to exist under Florida law.

10. In holding, in its orders and decrees filed April 17, 1934, and January 26, 1934, respectively, that in applying the common law standard of reasonableness upon the issue of quantum meruit, in establishing the fair and reasonable charge to be made for the past shipments here involved, the State Statutes, which control the making of future intrastate rates, should be regarded.

11. In holding, in its orders and decrees filed April 17, 1934, and January 26, 1934, respectively, that in applying said common law standard, in establishing the fair and reasonable charge to be made for the past shipments here involved, the Federal Statutes, which control the making of future intrastate rates, should be regarded.

12. In holding, in its orders and decrees filed April 17, 1934, and January 26, 1934, respectively, that in applying said common law standard, "the Florida law prohibits discrimination by common carriers."

13. In failing and refusing to hold, in its orders and decrees filed April 17, 1934 and January 26, 1934, respectively, that in applying said common law standard, the only kind of discrimination prohibited by Florida law for common carriers is *unjust* discrimination.

14. In holding, in its orders and decrees filed April 17, 1934 and January 26, 1934, respectively, that in applying said common law standard "discrimination ought to be avoided not only in fixing future rates but as far as practicable in measuring compensation for past services."

[fol. 1345] 15. In holding, in its orders and decrees filed April 17, 1934, and January 26, 1934, respectively, that in applying said common law standard the Federal law aimed at discrimination by State rates against Interstate Commerce is a matter which has any bearing on the restitution here sought.

16. In holding, in its orders and decrees filed April 17, 1934, and January 26, 1934, respectively, that in applying said common law standard, a uniform charge for carload shipments ought to be applied to all of the claims for restitution here involved.

17. In failing and refusing to determine, in its orders and decrees filed April 17, 1934, and January 26, 1934, respectively, in applying said common law standard, the reasonable charge for each transportation service here involved under the particular circumstances and conditions of each such transportation service.

18. In determining, in its orders and decrees filed April 17, 1934, and January 26, 1934, respectively, in applying said common law standard, an equal or uniform charge for the various transportation services here involved while recognizing differences in the conditions and circumstances of such transportation services.

19. In finding, in its orders and decrees filed April 17, 1934, and January 26, 1934, respectively, that, in applying said common law standard, the complainant is entitled to no more than the principal sum allowed it in said decree with interest as specified in said decree.

20. In failing and refusing to find, in its orders and decrees filed April 17, 1934, and January 26, 1934, respectively, that, in applying said common law standard, a rea-
[fol. 1346] sonable charge for the transportation service rendered to said complainant was a charge which would result in the recovery by and on behalf of said complainant of a sum greater than the sum allowed said complainant in and by said final decree but not exceeding the amount of overcharge claimed by said complainant.

21. In failing and refusing to find, in its orders and decrees filed April 17, 1934, and January 26, 1934, respectively, that, in applying said common law standard, a reasonable charge for the transportation service rendered to

said complainant was a charge which would result in the recovery by and on behalf of said complainant of the amount of overcharge claimed by said complainant.

Wherefore, the said complainant prays that the Supreme Court of the United States for the reasons severally set forth in the foregoing assignments do adjudge that the complainant is entitled to have restitution measured by the Cummer Scale, and that if the said Supreme Court of the United States shall adjudge that the Cummer Scale is not the measure which ought to be employed, then that it do adjudge that the complainant is entitled to restitution measured by said common law standard as was found by the District Court, but do adjudge that for the reasons set forth in the foregoing assignments the amount awarded to said complainant is inadequate in law and under the facts of the case; and that said Final Decree of the District Court filed April 17, 1934, be reversed and modified to accord with such judgment as the Supreme Court shall render [fols. 1347 & 1348] and such decree be rendered as ought to have been rendered by the District Court and that the complainant have such other and further relief as may be proper in the premises.

J. V. Norman, Solicitor for Said Complainant.

[File endorsement omitted.]

[fol. 1349] In United States District Court

No. 514. Consolidated Cause in Equity

[Title omitted]

Order Extending Time for Docketing Cause—Filed August 15, 1934

It appearing to the Court that on the 19th day of May 1934, an appeal was duly entered in this cause by the Atlantic Coast Line Railroad Company and citation duly issued therein the 19th day of May 1934, returnable to the Supreme Court of the United States on the 27th day of August, 1934, and it further appearing that a cross appeal was duly entered and filed by the complainants in the above entitled and numbered cause on the 12th day of June 1934,

wherein citation was duly issued returnable on the 27th day of August 1934 in the Supreme Court of the United States, and it further appearing that the record of the testimony in said cross appeal is voluminous and the narrative of said testimony cannot be completed within the return day of the citation in this appeal and cross appeal, on motion of the cross appellants by their counsel, It is considered, ordered and adjudged that the return date on the citation in the direct appeal and cross appeal be ex-
[fol. 1350] tended for a period of fourteen days, that is to say that the appellants and the cross appellants be allowed until the 10th day of September 1934 within which time to perfect the record and docket the direct appeal and cross appeal in the above numbered and styled cause, with the Clerk of the Supreme Court.

Done in Atlanta, Georgia, this the 15 day of August, 1934.

Sam'l H. Sibley, United States Circuit Judge; E. Marvin Underwood, United States District Judge.

We consent to the above and foregoing order.
This the 14 day of August, 1934.

Atlantic Coast Line Railroad Company, by Carl H. Davis, W. E. Kay, Robert C. Alston, W. H. Sibley, Its Attorneys.

[File endorsement omitted.]

[fol. 1351] In United States District Court

Consolidated Cause No. 514

[Title omitted]

Notice of Motion for Extension of Time—Filed July 9, 1934

To: United States of America, Interstate Commerce Commission, Georgia Public Service Commission, Atlantic Coast Line Railroad Company:

You will please take notice that on Monday, July 9th, 1934, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, we will present to the above entitled Court

in the Post Office Building in Atlanta, Georgia, our motion for extension of time to perfect the record on cross-appeal and apply for an order thereon, copies of such motion and [fol. 1352] of said proposed order being hereto attached and herewith served upon you.

Cary D. Landis, Attorney General of the State of Florida; Theo. T. Turnbull, Special Counsel for Florida Railroad Commission; H. P. Adair, August G. Gutheim, R. A. Baker, C. G. Ashby, Solicitors for Complainants, Brooks-Scanlon Corporation, Wilson Cypress Company, and Cummer Cypress Company; J. V. Norman, Solicitor for Wilson Lumber Company of Florida.

[File endorsement omitted.]

[fol. 1353] IN UNITED STATES DISTRICT COURT

Consolidated Cause No. 514

[Title omitted]

MOTION FOR EXTENSION OF TIME TO PERFECT RECORD—Filed July 9, 1934

Come now the complainants above named by their undersigned counsel, with leave of Court first had, and respectfully represents unto the Court as follows:

That on the 12th day of June, 1934, complainants' cross-appeal from the decree entered in this Court April 17, 1934, was duly allowed and entered; that citation has been issued rquiring the cross-appellees to appear in the Su- [fol. 1354] preme Court within forty days from the date thereof; that the time for the completion of the record upon the original appeal of the defendant, Atlantic Coast Line Railroad Company, herein was by order of this Court dated the 6th day of June, 1934, extended for sixty days from the 28th day of June, 1934; that it is impracticable to perfect the record upon said cross-appeal and print the same within the time allowed by the rules of this Court and the Supreme Court of the United States and until the record

in said original appeal of said Atlantic Coast Line Railroad Company is perfected and printed.

Wherefore, complainants, jointly and separately, pray that an extension of time be granted them within which to complete the record in said cross-appeal in this cause.

Cary D. Landis, Attorney General of the State of Florida; Theo. T. Turnbull, Special Counsel for Florida Railroad Commission; H. P. Adair, August G. Gutheim, R. A. Baker, C. G. Ashby, Solicitors for Complainants, Brooks-Scanlon Corporation, Wilson Cypress Company, and Cummer Cypress Company; J. V. Norman, Solicitor for Wilson Lumber Company of Florida.

The above and foregoing motion for extension of time within which to complete the record upon the cross-appeal herein having been presented to the Court, upon consideration,

[fol. 1355] It is ordered that the complainants, jointly and severally, be allowed to and including August 27th, 1934, within which to compile and complete the record in this cause for the cross-appeal herein to the Supreme Court of the United States.

Dated this 9 day of July, 1934.

Sam'l H. Sibley, United States Circuit Judge; E. Marvin Underwood, United States District Judge.

[File endorsement omitted.]

[fols. 1356 & 1357] State of Florida,
County of Duval:

Before me, a Notary Public for the State of Florida at Large, personally appeared C. G. Ashby, who being by me first duly sworn, deposes and says:

That on behalf of the above named complainants on June 30, 1934, he served the foregoing notice and the motion and order therein referred to upon United States of America, Interstate Commerce Commission, Georgia Public Service Commission and Atlantic Coast Line Railroad Company by depositing copies of said notice and said motion and order therein referred to, duly sealed in envelopes addressed respectively to:

"Elmer B. Collins, Esquire, Assistant Attorney General, Department of Justice, Washington, D. C.
"J. Stanley Payne, Esquire, Assistant Division Counsel, Interstate Commerce Commission, Washington, D. C.
"Georgia Public Service Commission, State Capitol Building, Atlanta, Georgia.
"Messrs. Alston, Alston, Foster & Moise, Citizens & Southern Bank Building, Atlanta, Georgia."

said affiant having theretofore affixed to said envelopes respectively sufficient uncancelled United States postage stamps to assure delivery thereof to said addressees.

C. G. Ashby.

Sworn to and subscribed before me this 30 day of June, A. D. 1934. Nell Hurst, Notary Public State of Florida at Large. (Seal.) My commission expires March 16, 1938.

[fol. 1358] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

Consolidated Cause No. 514

[Title omitted]

PRÆCIPE OF APPELLEES AND CROSS-APPELLANTS FOR ADDITIONAL PORTIONS OF RECORD—Filed July 6, 1934

The Clerk of the above entitled Court is hereby directed to certify, for the use of the Supreme Court of the United States, upon the appeal of the Atlantic Coast Line Railroad Company herein, and upon the cross-appeal of the State of Florida and E. S. Matthews, Mamie Eaton-Greene and W. B. Douglass, as and constituting the Florida Rail-
[fol. 1359] road Commission, complainants in Constituent Cause No. 514, above, Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company, complainants in Constituent Cause No. 511, and Wilson Lumber Company of Florida, complainant in Constituent Cause No. 512, the following additional portions of the record desired by said appellees and cross-appellants, such portions

being in addition to the portions of the record directed to be so certified by the præcipe for record of said Atlantic Coast Line Railroad Company, viz.:

1. Certificate of Horace M. Holden, Special Master, dated December 4, 1933;

2. All of the evidence taken by and filed before Horace M. Holden, Special Master, herein, both upon the reference and re-reference to him, including all exhibits and stipulations offered in evidence, or any narrative statement of such evidence agreed upon by the parties and/or approved by the Court;

3. Petition for cross-appeal, filed June 12, 1934;

4. Order granting cross-appeal, filed June 12, 1934;

5. Notice of cross-appeal, filed June 12, 1934;

6. Joint and several statement by complainants of the jurisdiction of the Supreme Court of the United States to review upon cross-appeal the above entitled consolidated cause, filed June 12, 1934;

7. Notice pursuant to Rule 12 of the Rules of the Supreme Court serving copies of certain papers and directing attention to Paragraph 3 of said Rule 12, filed June 12, 1934;

[fol. 1360] 8. Citation on joint and separate cross-appeal, filed June 12, 1934;

9. Bond on cross-appeal, filed June 12, 1934;

10. Separate assignment of errors of the State of Florida and E. S. Matthews, Mamie Eaton-Greene and W. B. Douglass as and constituting the Florida Railroad Commission, on cross-appeal, filed June 12, 1934;

11. Separate assignment of errors of Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company on cross-appeal, filed June 12, 1934;

12. Separate assignment of errors of Wilson Lumber Company of Florida on cross-appeal, filed June 12, 1934;

13. Motion and order for extension of time to perfect record on cross-appeal;

14. All notices and proofs of service and acknowledgments of service and affidavits and waivers in connection with the service upon or notice to counsel of record in this cause of any of the papers listed above in paragraphs numbered 3 to 13, inclusive;

15. This præcipe and proof of service thereof.

This 5th day of July, A. D. 1934.

Cary D. Landis, Attorney General of the State of Florida; Theo. T. Turnbull, Special Counsel for Florida Railroad Commission; H. P. Adair, August G. Gutheim, R. A. Baker, C. G. Ashby, Solicitors for Complainants, Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company; J. V. Norman, Solicitor for Wilson Lumber Company of Florida.

[File endorsement omitted.]

[fols. 1361 & 1362] STATE OF FLORIDA,
County of Duval, ss:

Before me, a Notary Public for the State of Florida at Large, personally appeared C. G. Ashby, who being by me first duly sworn, deposes and says:

That on behalf of the above named complainants on July 5th, 1934, he served the foregoing Præcipe of Appellees and Cross-Appellants for Additional Portions of Record upon United States of America, Interstate Commerce Commission, Georgia Public Service Commission and Atlantic Coast Line Railroad Company by depositing copies of said præcipe, duly sealed, in envelopes addressed respectively to:

"Elmer B. Collins, Esquire, Assistant Attorney General, Department of Justice, Washington, D. C.

"J. Stanley Payne, Esquire, Assistant Division Counsel, Interstate Commerce Commission, Washington, D. C.

"Georgia Public Service Commission, State Capitol Building, Atlanta, Georgia.

"Messrs. Alston, Alston, Foster & Moise, Citizens & Southern Bank Building, Atlanta, Georgia."

said affiant having theretofore affixed to said envelopes respectively sufficient uncancelled United States postage stamps to assure delivery thereof to said addresses.

C. G. Ashby.

Sworn to and subscribed before me this 5th day of July, A. D. 1934. Audrey W. Clark, Notary Public, State of Fla. at Large. (Seal.) My commission expires Feb. 9, 1938.

[fol. 1363] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

Consolidated Cause No. 514

[Title omitted]

NOTICE OF LODGMENT—Filed September 1, 1934

To: United States of America, Interstate Commerce Commission, Georgia Public Service Commission, Atlantic Coast Line Railroad Company:

You will please take notice that the undersigned, counsel for cross-appellants in the above entitled consolidated cause, have lodged in the office of the Clerk of the above entitled Court a narrative statement of the evidence in the above entitled consolidated cause, a copy of such statement being herewith served upon you. You are further hereby [fol. 1364] notified that the undersigned counsel for cross-appellants will ask the above entitled Court on the 1st day of September, A. D. 1934, at ten o'clock, A. M., or as soon thereafter as counsel can be heard, at the Chambers of the Judge of the United States District Court in the Post Office Building at Atlanta, Georgia, to approve said statement.

This 21st day of August, A. D. 1934.

Cary D. Landis, Attorney General of the State of Florida; Theo. T. Turnbull, Special Counsel for Florida Railroad Commission; H. P. Adair, August G. Gutheim, R. A. Baker, C. G. Ashby, Solicitors for Complainants, Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company; J. V. Norman, Solicitor for Wilson Lumber Company of Florida.

[fols. 1365-1368] STATE OF FLORIDA,
County of Duval, ss:

Before me, a Notary Public for the State of Florida at Large, personally appeared C. G. Ashby, who being by me first duly sworn, deposes and says:

That on behalf of the above named complainants on August 21st, 1934, he served the foregoing Notice and copies of the Narrative Statement of the Evidence therein mentioned upon United States of America, Interstate Commerce Commission, Georgia Public Service Commission and Atlantic Coast Line Railroad Company by depositing copies of said Notice and said Narrative Statement, duly sealed, in envelopes addressed respectively to:

"Elmer B. Collins, Esquire, Assistant Attorney General, Department of Justice, Washington, D. C.
"J. Stanley Payne, Esquire, Assistant Division Counsel, Interstate Commerce Commission, Washington, D. C.
"Georgia Public Service Commission, State Capitol Building, Atlanta, Georgia.
"Messrs. Alston, Alston, Foster & Moise, Citizens & Southern Bank Building, Atlanta, Georgia."

said affiant having theretofore affixed to said envelopes respectively sufficient uncancelled United States postage stamps to assure delivery thereof to said addresses.

C. G. Ashby.

Sworn to and subscribed before me this 29th day of August, A. D. 1934. Nell Hurst, Notary Public, State of Florida at Large. (Seal.) My commission expires March 16, 1938.

[fols. 1369-1374] Clerk's certificate to transcript of record omitted in printing.

[fol. 1375] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1934

No. 344

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed September 7, 1934

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this Court in this case are as follows:

Point One

That the District Court of the United States for the Northern District of Georgia erred in entering the final decree in this cause, entered and filed April 17, 1934, (R. p. —)* because said decree imposes on interstate commerce, in connection with the transportation of logs intrastate in Florida, a burden which the Interstate Commerce Commission has found that commerce ought not to bear. (Assignments of Error Nos. 1, 9, 11, 15, 16 and 17.)

Point Two

The Supreme Court of the United States in its opinion handed down April 2, 1934, in the case of Florida et al. vs. United States et al., 292 U. S. 1, found that the Interstate [fol. 1376] Commerce Commission had made the necessary intermediate findings to support its order of August 2, 1928, in Docket No. 18364 and that the said findings were sustained by the evidence. The lower court erred in failing to grant the amended motion of appellant filed April 14, 1934, (R., p. —)* setting up said opinion and praying judgment in its favor, and in awarding restitution to appellees in this case after the rendition of said opinion by the Supreme

*All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the United States District Court for the Northern District of Georgia and on file with the Clerk of this Court. The record has not yet been printed.

Court of the United States. (Assignments of Error Nos. 1, 15, 16 and 17.)

Point Three

The opinion of the Supreme Court of the United States handed down January 5, 1931, in the case of Florida et al. vs. United States et al., 282 U. S. 194, held that the 1928 report of the Interstate Commerce Commission in Docket No. 18364 did not on its face contain the necessary intermediate findings. The lower court erred in its order entered and filed on March 7, 1931, (R., p. —)* in construing the said opinion of the Supreme Court and the mandate pursuant thereto as holding that the 1928 order of the Interstate Commerce Commission in said Docket No. 18364 was null and void. (Assignments of Error Nos. 2, 3 and 8.)

Point Four

The lower court erred in holding that it or any court had jurisdiction to consider the claims of the appellees, Florida shippers, made in this case for restitution while there was pending before the Interstate Commerce Commission the reopened proceeding in Docket No. 18364. (Assignments of Error Nos. 4, 5, 6, 7, 9, 11 and 17.)

[fol. 1577]

Point Five

The court below had no jurisdiction to allow restitution in this cause until the Interstate Commerce Commission had determined whether or not there should be restitution paid to said claimants by this appellant; nor until the said Commission had fixed the amount to be so paid; nor until it had determined the standard to be applied in ascertaining the amount of said restitution. (Assignments of Error Nos. 4, 5, 6 and 11.)

Point Six

The lower court erred in awarding restitution in this case before the Interstate Commerce Commission had fixed a rate which might be used in awarding restitution, and this is emphasized by the facts that there was then pending undetermined before the Interstate Commerce Commission the reopened proceeding in Docket No. 18364. (Assignments of Error Nos. 4, 5, 6, 7, 9, 11 and 17.)

Point Seven

The court below erred in denying, by its decreee of July 31, 1931, (R. p. —)* appellant's motion contained in its response filed March 7, 1931, as later amended (R., pp —)*, and in refusing to enjoin the Florida Commission from putting into effect the intrastate scale of rates known as the Cummer scale. By its subsequent opinion filed January 30, 1933, (R., p. —)* the lower court found said scale of rates to be unreasonable, unjust and confiscatory. (Assignments of Error Nos. 5 and 7.)

[fol. 1378]

Point Eight

The court below had no jurisdiction to award, by its decree of January 30, 1933, (R., p. —)* restitution against the appellant in this case on the basis of any rate or charge to be determined by said lower court on a "common law standard of reasonableness". (Assignments of Error Nos. 4, 5, 10 and 17.)

Point Nine

After the lower court had by its opinion of January 30, 1933, (R., p. —)* found the Cummer scale of rates on logs, intrastate in Florida, to be confiscatory and void, the lower court erred in refusing to grant appellant's motion filed March 15, 1933, (R., p. —)* and in entering its order of March 21, 1933, (R., p. —)*, and in failing to enter a decree in favor of appellant, and in failing to direct the Master to find the several amounts due to the appellant by the several Florida shippers, appellees here, for shipments made during the period March 1931-February 1933, during which period the appellant railroad, under protest and with notice to shippers, collected only the Cummer scale of rates. (Assignments of Error Nos. 11, 12 and 17.)

Point Ten

The lower court, after holding that the Cummer scale of rates intrastate in Florida was confiscatory and void, in its opinion of January 30, 1933, (R., p. —)* imposed on the plaintiffs there, appellees here, a condition precedent to their further proceeding against the appellant as set out in its decrees of January 30, 1933, and March 21, 1933,

[fol. 1379] (R., pp. —)*. It appears from the opinion of the lower court handed down January 26, 1934, (R., p. —)* that no two of the three Judges of the lower court were able to agree as to what said condition meant or whether the said plaintiffs, appellees here, had complied with the said condition. In these circumstances the Court erred in entering its final decree filed April 17, 1934, (R., p. —)* in favor of the said plaintiffs, appellees here. (Assignments of Error Nos. 13, 14 and 17.)

Point Eleven

The findings of fact made by the lower court in its opinion filed January 26, 1934, (R., p. —)* did not justify and do not sustain the decree appealed from. (Assignment of Error No. 16.)

Point Twelve

The pleadings of the appellees in this cause did not justify and do not sustain the decree appealed from. (Assignment of Error No. 17.)

[fol. 1380] Designation of the Parts of the Record Necessary for the Consideration of the Points to be Relied on.

And the appellant further states that only the following parts of the record, as filed in this Court, are necessary for the consideration of the points above specified and need be printed by the Clerk for the hearing of the case:

Title of paper	Item No. on praecipe
1. The three mandates of the Supreme Court of the United States in the constituent causes, filed March 7, 1931	1
2. The three motions of the complainants in the constituent causes for decree in accordance with the mandates in Nos. 511 and 514 filed February 28, 1931, and in No. 512 filed March 2, 1931	2
3. Amendment of motion for decree filed March 7, 7, 1931, in No. 514 by complainant State of Florida, with notation that the amendments of	

Title of paper	Item No. on precipe
the complainants in the other two constituent causes are identical except as to name	3(1)
4. Response of Atlantic Coast Line Railroad Company to complainant's motion, filed March 7, 1931, in constitutent cause No. 514, with notation that the allegations of response in the two other constituent causes are the same	4(1)
5. Order making the mandate the judgment of the District Court, filed March 7, 1931	6
6. First amendment to response of Atlantic Coast Line Railroad Company filed March 17, 1931, in constituent cause No. 514, with notation that the allegations of amendments in the two other constituent causes are the same	7(1)
7. Second amendment to response of Atlantic Coast Line Railroad Company filed April 15, 1931, in constituent cause No. 514, with notation that the allegations of the second amendments in the two other constituent causes are the same	9(1)
8. Order of the United States District Court referring cause to Special Master, filed July 31, 1931	11
[fol. 1381] 9. Application and petition of Special Master for instructions filed February 17, 1932	12
10. Opinion of District Court on petition of Special Master and order of re-reference, filed March 18, 1932	13
11. First report of Special Master, filed November 14, 1932	14
12. Exceptions of Atlantic Coast Line Railroad Company to first report of the Master, filed November 30, 1932	15
13. Opinion of the District Court, filed January 30, 1933	19
14. Order of District Court overruling exceptions and re-referring cause to Master, filed January 20, 1933	20

Title of paper	Item No. on præcipe
15. Petition of Atlantic Coast Line Railroad Company for decree on Master's report, filed March 15, 1933	21
16. Order of District Court denying petition of Atlantic Coast Line Railroad Company, filed March 21, 1933	23
17. Second report of Master, filed November 7, 1933	24
18. Exceptions of Atlantic Coast Line Railroad Company to second report of Master, filed November 25, 1933	25
19. Answer of Atlantic Coast Line Railroad Company to various claims filed December 29, 1933, with notation that all answers contain the same allegations except as to name of claimant and amount of claim, which are as follows:	29

In the claim of State of Florida et al., twenty-seven, as follows:

J. Ray Arnold Cypress Company	$2,944.22
American Hardwood Corporation	3,033.57
Atlantic Hardwood Corporation	2,492.91
J. B. Adkins, Trustee in Bankruptcy, Brown Brothers Company (No. 1)	424.10
J. B. Adkins, Trustee in Bankruptcy, Brown Brothers Company (No. 2)	86.95
Brown Hardwood Company	93.22

[fol. 1382]

Brown Investment Company	174.40
F. S. Buffum & Company	1,644.16
Dense Pine Lumber Company	53.69
Dowling-Camp Lumber Company	32.34
The Everglade Cypress Company	4,324.45
Gress Manufacturing Company	357.21
Hair Hardwood Company	467.48
Hazzard Brothers	459.25
Hessler Hardwood Company	902.01
J. W. Jones Lumber Company	918.09
Kruesen Land & Timber Com-	

Title of paper		Item No. on praecipe
pany	385.64	
Long Leaf Lumber Company	4,384.61	
Putnam Lumber Company	9,981.40	
Southeastern Hardwood Company	1,016.55	
Eugene Stacey	408.51	
Eugene Stacey (additional)	117.11	
George B. Stallings Company	153.06	
Ben Tillman	54.26	
Thompson-Katz Lumber Company	5,225.60	
Thompson-Katz Lumber Company (additional)	388.91	
Wilson-Otwell Lumber Corporation	166.30	
Claim of Brooks-Scanlon Corporation	5,631.34	
Claim of Cummer Cypress Company	48,791.40	
Claim of Wilson Cypress Company	157,149.41	
Claim of Wilson Lumber Company of Florida	41,684.23	

[fol. 1383]

20. Opinion and order of District Court overruling exceptions to second report of the Master filed January 26, 1934	31
21. Motion of Atlantic Coast Line Railroad Company in constituent cause No. 514, with notation that the allegations of the motions in the two other constituent causes are the same	32(1)
22. Amendment of Motion of Atlantic Coast Line Railroad Company	33
23. Certified copy of certain pages of the record of hearing before the Master	34
24. Order of District Court consolidating the causes	35
25. Final decree of the District Court	36
26. Notice by Atlantic Coast Line Railroad Company of intention to appeal	37

27. Petition for appeal, assignment of errors, and prayer for reversal 38
28. Order allowing separate appeal 39
29. Statement as to jurisdiction and acknowledgment
30. Citation and acknowledgments 41
31. Notice of motion for summons and severance .. 42
32. Motion for severance and order thereon 43
33. Petition for supersedeas and order thereon 44
34. Motion for extension of time to perfect record .. 45
35. Motion to take up original record, and order thereon 46
36. Notice of appeal 47
37. Stipulation 48
38. Præcipe for original record 49
39. Motion and order extending time 50

Respectfully submitted, Carl H. Davis, W. E. Kay, Robert C. Alston, Wm. Hart Sibley, Counsel for Atlantic Coast Line Company, Appellant; Alfred P. Thom, Alston, Alston, Foster & Moise, of Counsel.

[fols. 1384 & 1385] Service of copy of the foregoing Statement of Points and Designation of the Record is hereby acknowledged.

This 4th day of September, 1934.

Cary D. Landis, Attorney General for the State of Florida; Theo. T. Turnbull, Special Counsel Florida Railroad Commission; H. P. Adair, August G. Gutheim, R. A. Baker, C. G. Ashby, Counsel Wilson Cypress Company, Brooks-Scanlon Corporation, and Cummer Cypress Company; J. V. Norman, Counsel Wilson Lumber Company of Florida.

[fol. 1386] [File endorsement omitted.]

[fol. 1387] IN SUPREME COURT OF THE UNITED STATES

No. 345. October Term, 1934

SEPARATE STATEMENT OF POINTS UPON WHICH THE CROSS-APPELLANT, WILSON LUMBER COMPANY OF FLORIDA, INTENDS TO RELY AND OF THE PARTS OF THE RECORD WHICH ARE NECESSARY FOR THE CONSIDERATION THEREOF—Filed September 11, 1934

Wilson Lumber Company of Florida, appellee and cross-appellant in this appeal for the reversal of the decree of the United States District Court for the Northern District [fol. 1388] of Georgia, Atlanta Division, relies upon all the points raised by its Assignments of Error, including among others, the following points:

1. The District Court erred in failing and refusing to restore to this appellee and cross-appellant the full amount of the sums claimed by it in the restitution proceedings before said District Court; such sums respectively were benefits which were received by the Atlantic Coast Line Railroad Company under and by reason of the erroneous decrees of the District Court (which decrees were afterwards reversed by the Supreme Court of the United States) and which were received by said Railroad Company by virtue of the failure of the District Court to enter in the first instance the decree which said Supreme Court afterwards adjudged that the said District Court should have entered.

(This point is applicable to Assignments of Error numbered 1, 2, 3 and 4.)

2. This appellee and cross-appellant is entitled to restitution of the full amount claimed by it, such amount being the difference between the amounts paid by it to the Atlantic Coast Line Railroad Company for the transportation of logs in Florida in intrastate commerce under the scale of rates prescribed by the unlawful and invalid order of the Interstate Commerce Commission sustained herein by the erroneous decree of the District Court and the amounts which would have been paid by it for such transportation service under the scale of State rates which was in effect when said invalid order became effective. Said Scale of State rates had been established and had been in effect

more than fifteen years and was being maintained subject [fol. 1389] to the authority of the State of Florida and was published as required by its laws and was in force and effect for such transportation service in Florida when said unlawful and invalid order of the Interstate Commerce Commission became effective and was the scale of State rates which the said unlawful and invalid order of the Interstate Commerce Commission purported to supersede.

(This point is applicable to Assignments of Error numbered 1, 2, 3 and 4.)

3. The lawful established rate for the transportation of logs in intrastate commerce in Florida at the time when said unlawful order of the said Interstate Commerce Commission dated August 2, 1928, became effective, was the Cummer Scale of rates. And such was the lawful State rate at the time when the District Court failed and refused to enjoin and set aside the said unlawful order of the Interstate Commerce Commission. It was the duty of the District Court to have set aside in the first instance the said unlawful and invalid order which purported to supersede the Cummer Scale. And upon the reversal of the erroneous decree of the District Court it became the duty of the District Court to award restitution to this appellee and cross-appellant upon the basis of the Cummer Scale, and to have restored the parties (as far as possible) to the positions which they occupied at the time when the District Court entered its erroneous decree.

(This point is applicable to Assignments of Error numbered 1 to 8 inclusive.)

4. The District Court found in effect that all sums collected by the Atlantic Coast Line Railroad Company from this appellee and cross-appellant for the transportation of logs during the restitution period were collected solely by virtue of the invalid order of the Interstate Commerce [fol. 1390] Commission, which was upheld by said District Court. When the erroneous decree of the District Court was reversed and the invalid order of the Interstate Commerce Commission was set aside, it became the duty of the District Court to award restitution on the basis of the lawful State rate in force at the time when its erroneous decree was entered, and it became the duty of the Atlantic Coast Line Railroad Company to make such restitution before

asserting anywhere in any court any claim against this appellee and cross-appellant with respect to the reasonableness, justness or compensatory or confiscatory character of the said lawful State rate.

(This point is applicable to Assignments of Error numbered 1 to 8 inclusive.)

5. When the Supreme Court by its mandate reversed the erroneous decree of the District Court, and when the District Court set aside the invalid order of the Interstate Commerce Commission, the said unlawful order and said erroneous decree and all benefits acquired under them and all proceedings taken pursuant to or on account of them became ineffective as of the time when the said erroneous decree was entered; and the rate applicable to the several shipments of logs involved in these restitution proceedings thereupon became the lawful State rate which had been superseded by the invalid order of the Interstate Commerce Commission, and it was the duty of the District Court to apply such lawful State rate in awarding the restitution here sought.

(This point is applicable to Assignments of Error numbered 1 to 8 inclusive.)

6. When the District Court, pursuant to the mandate of the Supreme Court of the United States set aside the invalid order of the Interstate Commerce Commission which had attempted to supersede the State rate, viz., the Cummer Scale, the District Court should have awarded restitu-
[fol. 1391] tion upon the basis of the said State rate and thus righted the wrong which had resulted from its erroneous decree without inquiring or hearing evidence as to whether the said State rate was reasonable or unreasonable, just or unjust, remunerative or confiscatory.

(This point is applicable to Assignments of Error numbered 5 to 8 inclusive.)

7. In applying the common law standard of reasonableness in awarding restitution herein upon the issue of quantum meruit, the District Court should have found that the evidence with respect to the circumstances and conditions and costs of the movements of the logs consigned to this appellee and cross-appellant at Perry, Florida, was not such as to overcome the presumption of justness and reasonableness of the Cummer Scale of rates.

(This point is applicable to Assignment of Error Numbered 9.)

8. In applying the common law standard of reasonableness to the charges for transportation services rendered in the past, the District Court in awarding restitution upon such standard should not have given consideration to (a) the State statutes, or (b) the Federal statutes, which relate to the making of rates to be established for future application.

(This point is applicable to Assignments of Error numbered 10 and 11.)

9. In applying the common law standard of reasonableness to the charges here involved, the District Court in awarding restitution upon such standard should not have given consideration to discrimination of any sort, either [fol. 1392] as between persons or localities or as against interstate commerce, under (a) the Florida statutes, or (b) the Federal statutes.

(This point is applicable to Assignments of Error numbered 12 to 15 inclusive.)

10. Neither (a) the State statutes, nor (b) the Federal statutes condemn discrimination unless the same be unjust discrimination. All or substantially all the shipments of logs moving to this appellees and cross-appellant at Perry, Florida, moved under circumstances and conditions and at a cost substantially different from the movements of logs to the shippers of single carloads in Florida during said restitution period. A lower charge for the transportation of logs to such destination under such circumstances constitutes no discrimination of any sort. In applying the common law standard of reasonableness the District Court should have awarded restitution to this appellee and cross-appellant upon a basis substantially lower than that generally established, viz., upon a basis not substantially higher than the Cummer Scale.

(This point is applicable to Assignments of Error numbered 12 to 21 inclusive.)

11. In applying the common law standard of reasonableness to the charges here involved, the District Court in awarding restitution upon such standard should have awarded to this cross-appellant a greater sum than the sum

so awarded to it in and by the final decree herein, viz., not substantially less than the amount of such overcharges claimed by this cross-appellant.

(This point is applicable to Assignments of Error numbered 19, 20 and 21.)

[fol. 1393] Parts of the Record Necessary for the Consideration of the Points Above Mentioned

And the said appellee and cross-appellant represents that the whole of the record is necessary for the consideration of the points above specified, except the exhibits numbered and identified in the evidence as follows:

Alston No. 1 to Alston No. 8, inclusive;
Alston No. 13;
Adair No. 10, Adair No. 11, and Adair No. 12;
Perrin No. 1 to Perrin No. 22, inclusive;
Lamb No. 3; Lamb No. 4; Lamb No. 8 to Lamb No. 22, inclusive; and Lamb No. 24 to Lamb No. 43 inclusive:
Warren No. 1 to Warren No. 18, inclusive;
Langley No. 1 and Langley No. 2;
Ledbetter No. 1 and Ledbetter No. 2;
A. C. L. No. 1; A. C. L. No. 2; A. C. L. No. 3;
Claimants' No. 1 to No. 4, inclusive;
Claimants' No. 1-A; No. 7-A; No. 9-A-1 to No. 9-A-10 inclusive; No. 10-A; No. 11-A; No. 17-A; No. 19-A; No. 21-A; No. 23-A; No. 25-A; No. 27-A; No. 31-A; No. 33-A; No. 35-A; No. 37-A; No. 39-A; No. 41-A; No. 47-A; No. 52-A to No. 62-A, inclusive; No. 67-A; No. 68-A; No. 69-A; No. 85-A to No. 89-A, inclusive; No. 92-A to No. 97-A, inclusive; No. 100-A; No. 101-A; No. 103-A; No. 105-A; No. 106-A and No. 108-A;
Defendant's No. 1-B to No. 8-B, inclusive; No. 10-B to No. 72-B, inclusive; and No. 74-B to No. 77-B, inclusive.

Respectfully submitted, J. V. Norman, Norman, Quirk & Graham, Solicitors for said Appellee and Cross-Appellant.

[fols. 1394 & 1395] State of Florida,
County of Duval, ss:

Before me, a Notary Public for the State of Florida at Large, personally appeared C. G. Ashby, who being by me first duly sworn, deposes and says:

That on behalf of the above named appellee and cross-appellant on September 10th, 1934, he served the foregoing Separate Statement of Points and of the Parts of the Record which are Necessary for the Consideration Thereof upon United States of America, Interstate Commerce Commission, Georgia Public Service Commission and Atlantic Coast Line Railroad Company by depositing copies of said Statement, duly sealed in envelopes addressed respectively to:

"Elmer B. Collins, Esquire, Assistant Attorney General, Department of Justice, Washington, D. C.
"J. Stanley Payne, Esquire, Assistant Division Counsel, Interstate Commerce Commission, Washington, D. C.
"Georgia Public Service Commission, State Capitol Building, Atlanta, Georgia.
"Messrs. Alston, Alston, Foster & Moise, Citizens & Southern Bank Building, Atlanta, Georgia."

in the United States Post Office at Jacksonville, Florida, on said day, said affiant having theretofore affixed to said envelopes respectively sufficient uncancelled United States postage stamps to assure delivery thereof to said addresses.

C. G. Ashby.

Sworn to and subscribed before me this 10th day of September, A. D. 1934. Nell Hurst, Notary Public, State of Florida at Large. (Seal.)

[fol. 1396] [File endorsement omitted.]

[fol. 1397] IN SUPREME COURT OF THE UNITED STATES

No. 345. October Term, 1934

SEPARATE STATEMENT OF POINTS UPON WHICH THE CROSS-APPELLANTS BROOKS-SCANLON CORPORATION, WILSON CYPRESS COMPANY, AND CUMMER CYPRESS COMPANY, INTEND TO RELY, AND OF THE PARTS OF THE RECORD WHICH ARE NECESSARY FOR THE CONSIDERATION THEREOF—Filed September 11, 1934

Brooks-Scanlon Corporation, Wilson Cypress Company, and Cummer Cypress Company, appellees and cross-ap-

pellants in this appeal for the reversal of the decree of the United States District Court for the Northern District [fol. 1398] of Georgia, Atlanta Division, rely upon all the points raised by their Assignments of Error, including among others, the following points:

1. The District Court erred in failing and refusing to restore to these appellees and cross-appellants the full amount of the sums claimed by them respectively in the restitution proceedings before said District Court; such sums respectively were benefits which were received by the Atlantic Coast Line Railroad Company under and by reason of the erroneous decrees of the District Court (which decrees were afterwards reversed by the Supreme Court of the United States) and which were received by said Railroad Company by virtue of the failure of the District Court to enter in the first instance the decree which said Supreme Court afterwards adjudged that the said District Court should have entered.

(This point is applicable to Assignments of Error numbered 1, 2, 3 and 4.)

2. These appellees and cross-appellants are entitled to restitution of the full amounts claimed by them respectively, such amounts respectively being the difference between the amounts paid by them respectively to the Atlantic Coast Line Railroad Company for the transportation of logs in Florida in intrastate commerce under the scale of rates prescribed by the unlawful and invalid order of the Interstate Commerce Commission sustained herein by the erroneous decree of the District Court and the amounts which would have been paid by them respectively for such transportation service under the scale of State rates which was in effect when said invalid order became effective. [fol. 1399] Said scale of State rates had been established and had been in effect more than fifteen years and was being maintained subject to the authority of the State of Florida and was published as required by its laws and was in force and effect for such transportation service in Florida when said unlawful and invalid order of the Interstate Commerce Commission became effective and was the scale of State Rates which the said unlawful and invalid order of the Interstate Commerce Commission purported to supersede.

(This point is applicable to Assignments of Error numbered 1 2, 3 and 4.)

3. The lawful established rate for the transportation of logs in intrastate commerce in Florida at the time when said unlawful order of the said Interstate Commerce Commission dated August 2, 1928, became effective, was the Cummer Scale of rates. And such was the lawful State rate at the time when the District Court failed and refused to enjoin and set aside the said unlawful order of the Interstate Commerce Commission. It was the duty of the District Court to have set aside in the first instance the said unlawful and invalid order which purported to supersede the Cummer Scale. And upon the reversal of the erroneous decree of the District Court it became the duty of the District Court to award restitution to the appellees and cross-appellants upon the basis of the Cummer Scale, and to have restored the parties (as far as possible) to the positions which they occupied at the time when the District Court entered its erroneous decree.

(This point is applicable to Assignments of Error numbered 1 to 8 inclusive.)

[fol. 1400] 4. The District Court found in effect that all sums collected by the Atlantic Coast Line Railroad Company from the appellees and cross-appellants for the transportation of logs during the restitution period were collected solely by virtue of the invalid order of the Interstate Commerce Commission, which was upheld by said District Court. When the erroneous decree of the District Court was reversed and the invalid order of the Interstate Commerce Commission was set aside, it became the duty of the District Court to award restitution on the basis of the lawful State rate in force at the time when its erroneous decree was entered, and it became the duty of the Atlantic Coast Line Railroad Company to make such restitution before asserting anywhere in any court any claim against the appellees and cross-appellants with respect to the reasonableness, justness or compensatory or confiscatory character of the said lawful State rate.

(This point is applicable to Assignments of Error numbered 1 to 8 inclusive.)

5. When the Supreme Court by its mandate reversed the erroneous decree of the District Court, and when the Dis-

trict Court set aside the invalid order of the Interstate Commerce Commission, the said unlawful order and said erroneous decree and all benefits acquired under them and all proceedings taken pursuant to or on account of them became ineffective as of the time when the said erroneous decree was entered; and the rate applicable to the several shipments of logs involved in these restitution proceedings thereupon became the lawful State rate which had been [fol. 1401] superseded by the invalid order of the Interstate Commerce Commission, and it was the duty of the District Court to apply such lawful State rate in awarding the restitution here sought.

(This point is applicable to Assignments of Error numbered 1 to 8 inclusive.)

6. When the District Court, pursuant to the mandate of the Supreme Court of the United States set aside the invalid order of the Interstate Commerce Commission which had attempted to supersede the State rate, viz., the Cummer Scale, the District Court should have awarded restitution upon the basis of the said State rate and thus righted the wrong which had resulted from its erroneous decree without inquiring or hearing evidence as to whether the said State rate was reasonable or unreasonable, just or unjust, remunerative or confiscatory.

(This point is applicable to Assignments of Error numbered 5 to 8 inclusive.)

7. In applying the common law standard of reasonableness in awarding restitution herein upon the issue of quantum meruit, the District Court should have found that the evidence with respect to the circumstances and conditions and costs of the movements of logs (a) consigned from Hines, Florida, to Wilson Cypress Company at Palatka, Florida; (b) consigned from Homosassa, Florida, to Cum- [fol. 1402] mer Cypress Company at Lacoochee, Florida; and (c) consigned from Carbur and Perry, Florida, to Brooks-Scanlon Corporation, at Eastport, Florida, respectively, was not such as to overcome the presumption of justness and reasonableness of the Cummer Scale of rates.

(This point is applicable to Assignments of Error numbered 9, 10 and 11.)

8. In applying the common law standard of reasonableness to the charges for transportation services rendered in the past, the District Court in awarding restitution upon such standard should not have given consideration to (a) the State statutes, or (b) the Federal statutes, which relate to the making of rates to be established for future application.

(This point is applicable to Assignments of Error numbered 12 and 13.)

9. In applying the common law standard of reasonableness to the charges here involved, the District Court in awarding restitution upon such standard should not have given consideration to discrimination of any sort, either as between persons or localities or as against interstate commerce, under (a) the Florida statutes, or (b) the Federal statutes.

(This point is applicable to Assignments of Error numbered 14 to 17 inclusive.)

[fol. 1403] 10. Neither (a) the State statutes, nor (b) the Federal statutes condemn discrimination unless the same be unjust discrimination. All or substantially all the shipments of logs moving, respectively: to the appellee and cross-appellant Brooks-Scanlon Corporation from Perry and Carbur, Florida, to Eastport, Florida; and to the appellee and cross-appellant Wilson Cypress Company from Hines, Florida, to Palatka, Florida; and to the appellee and cross-appellant Cummer Cypress Company from Homosassa, Florida, to Lacoochee, Florida, moved in trainload quantities, and under circumstances and conditions and at a cost substantially different from the movements of logs to the other shippers in Florida during said restitution period. Such was the effect of the decision of the District Court dated January 22nd, 1934, filed January 26th, 1934. A lower charge for the transportation of logs from such points of origin to such destinations under such circumstances constitutes no discrimination of any sort. In applying the common law standard of reasonableness the District Court should have awarded restitution to these appellees and cross-appellants upon a basis substantially lower than that generally established, viz., upon a basis not substantially higher than the Cummer Scale.

(This point is applicable to Assignments of Error numbered 14 to 23 inclusive.)

11. In applying the common law standard of reasonableness to the charges here involved, the District Court in awarding restitution upon such standard should have awarded to these cross-appellants respectively a greater sum than the sum so awarded to them respectively in and by the final decree herein, viz., not substantially less than [fol. 1404] the amounts of such overcharges claimed by said cross-appellants respectively.

(This point is applicable to Assignments of Error numbered 21, 22 and 23.)

Parts of the Record Necessary for the Consideration of the Points Above Mentioned

And the said appellees and cross-appellants respectively represent that the whole of the record is necessary for the consideration of the points above specified, except the Exhibits numbered and identified in the evidence as follows:

Alston No. 1 to Alston No. 8, inclusive;
Alston No. 13;
Adair No. 10; Adair No. 11 and Adair No. 12;
Perrin No. 1 to Perrin No. 22, inclusive;
Lamb No. 3; Lamb No. 4; Lamb No. 8 to Lamb No. 22, inclusive; and Lamb No. 24 to Lamb No. 43, inclusive;
Warren No. 1 to Warren No. 18, inclusive;
Langley No. 1 and Langley No. 2;
Ledbetter No. 1 and Ledbetter No. 2;
A. C. L. No. 1; A. C. L. No. 2; A. C. L. No. 3;
Claimants' No. 1 to No. 4, inclusive;
Claimants' No. 1-A; No. 7-A; No. 9-A-1 to No. 9-A-10, inclusive; No. 10-A; No. 11-A; No. 17-A; No. 19-A; No. 21-A; No. 23-A; No. 25-A; No. 27-A; No. 31-A; No. 33-A; No. 35-A; No. 37-A; No. 39-A; No. 41-A; No. 47-A; No. 52-A to No. 62-A, inclusive; No. 67-A; No. 68-A; No. 69-A; No. 85-A to No. 89-A, inclusive; No. 92-A to No. 97-A, inclusive; No. 100-A; No. 101-A; No. 103-A; No. 105-A; No. 106-A; and No. 108-A;

Defendant's No. 1-B to No. 8-B, inclusive; No. 10-B to No. 72-B, inclusive; and No. 74-B to No. 77-B, inclusive.

Respectfully submitted, H. P. Adair, August G. Gutheim, R. A. Baker, C. G. Ashby, Solicitors for said Appellees and Cross-Appellants.

[fols. 1405 & 1406] STATE OF FLORIDA,
County of Duval, ss:

Before me, a Notary Public for the State of Florida at Large, personally appeared C. G. Ashby, who being by me first duly sworn, deposes and says:

That on behalf of the above named appellees and cross-appellants on September 10th, 1934, he served the foregoing Separate Statement of Points and of the Parts of the Record which are Necessary for the Consideration Thereof upon United States of America, Interstate Commerce Commission, Georgia Public Service Commission and Atlantic Coast Line Railroad Company, by depositing copies of said Statement, duly sealed in envelopes addressed respectively to;

"Elmer B. Collins, Esquire, Assistant Attorney General, Department of Justice, Washington, D. C.

"J. Stanley Payne, Esquire, Assistant Division Counsel, Interstate Commerce Commission, Washington, D. C.

"Georgia Public Service Commission, State Capitol Building, Atlanta, Georgia.

"Messrs. Alston, Alston, Foster & Moise, Citizens & Southern Bank Building, Atlanta, Georgia."

in the United States Post Office at Jacksonville, Florida, on said day, said affiant having theretofore affixed to said envelopes respectively sufficient uncancelled United States postage stamps to assure delivery thereof to said addressees.

C. G. Ashby.

Sworn to and subscribed before me this 10th day of September, A. D. 1934. Nell Hurst, Notary Public, State of Florida at Large. My commission expires March 16, 1938. (Seal.)

[fol. 1407] [File endorsement omitted.]

[fol. 1408] IN SUPREME COURT OF THE UNITED STATES

October Term, 1934

No. 345

SEPARATI STATEMENT OF POINTS UPON WHICH THE CROSS-APPELLANTS, THE STATE OF FLORIDA AND E. S. MATTHEWS, MAMIE EATON-GREENE AND W. B. DOUGLASS, AS AND CONSTITUTING THE FLORIDA RAILROAD COMMISSION, INTEND TO RELY AND OF THE PARTS OF THE RECORD WHICH ARE NECESSARY FOR THE CONSIDERATION THEREOF—Filed Sept. 11, 1934

The State of Florida and E. S. Matthews, Mamie Eaton-Greene and W. B. Douglass, as and constituting the Florida Railroad Commission, appellees and cross-appellants in this appeal for the reversal of the decree of the United [fol. 1409] States District Court for the Northern District of Georgia, Atlanta Division, rely upon all the points raised by their Assignments of Error, including among others, the following points:

1. The District Court erred in failing and refusing to restore to these appellees and cross-appellants the full amount of the sums claimed by them, on behalf of the several shippers represented by them in the restitution proceedings before said District Court; such sums respectively were benefits which were received by the Atlantic Coast Line Railroad Company under and by reason of the erroneous decrees of the District Court (which decrees were afterwards reversed by the Supreme Court of the United States) and which were received by said Railroad Company by virtue of the failure of the District Court to enter in the first instance the decree which said Supreme Court afterwards adjudged that the said District Court should have entered.

(This point is applicable to Assignments of Error numbered 1, 2, 3 and 4.)

2. These appellees and cross-appellants, on behalf of the several shippers represented by them, are entitled to restitution of the full amounts claimed on behalf of such shippers respectively, such amounts respectively being the dif-

ference between the amounts paid by such shippers respectively to the Atlantic Coast Line Railroad Company for the transportation of logs in Florida in intrastate commerce under the scale of rates prescribed by the unlawful and invalid order of the Interstate Commerce Commission sustained herein by the erroneous decree of the District Court and the amounts which would have been paid by them respectively for such transportation service [fol. 1410] under the scale of State rates which was in effect when said invalid order became effective. Said scale of State rates had been established and had been in effect more than fifteen years and was being maintained subject to the authority of the State of Florida and was published as required by its laws and was in force and effect for such transportation service in Florida when said unlawful and invalid order of the Interstate Commerce Commission became effective and was the scale of State rates which the said unlawful and invalid order of the Interstate Commerce Commission purported to supersede.

(This point is applicable to Assignments of Error numbered 1, 2, 3 and 4.)

3. The lawful established rate for the transportation of logs in intrastate commerce in Florida at the time when said unlawful order of the said Interstate Commerce Commission dated August 2, 1928, became effective, was the Cummer Scale of rates. And such was the lawful State rate at the time when the District Court failed and refused to enjoin and set aside the said unlawful order of the Interstate Commerce Commission. It was the duty of the District Court to have set aside in the first instance the said unlawful and invalid order which purported to supersede the Cummer Scale. And upon the reversal of the erroneous decree of the District Court it became the duty of the District Court to award restitution to the appellees and cross-appellants, on behalf of the several shippers represented by them, upon the basis of the Cummer Scale, and to have restored the parties (as far as possible) to the positions which they occupied at the time when the District Court entered its erroneous decree.

(This point is applicable to Assignments of Error numbered 1 to 8 inclusive.)

[fol. 1411] 4. The District Court found in effect that all sums collected by the Atlantic Coast Line Railroad Com-

pany from the several shippers here represented by these appellees and cross-appellants for the transportation of logs during the restitution period were collected solely by virtue of the invalid order of the Interstate Commerce Commission, which was upheld by said District Court. When the erroneous decree of the District Court was reversed and the invalid order of the Interstate Commerce Commission was set aside, it became the duty of the District Court to award restitution on the basis of the lawful State rate in force at the time when its erroneous decree was entered, and it became the duty of the Atlantic Coast Line Railroad Company to make such restitution before asserting anywhere in any court any claim against the appellees and cross-appellants, on behalf of the several shippers represented by them, with respect to the reasonableness, justness or compensatory or confiscatory character of the said lawful State rate.

(This point is applicable to Assignments of Error numbered 1 to 8 inclusive.)

5. When the Supreme Court by its mandate reversed the erroneous decree of the District Court, and when the District Court set aside the invalid order of the Interstate Commerce Commission, the said unlawful order and said erroneous decree and all benefits acquired under them and all proceedings taken pursuant to or on account of them became ineffective as of the time when the said erroneous decree was entered; and the rate applicable to the several shipments of logs involved in these restitution proceedings thereupon became the lawful State rate which had been superseded by the invalid order of the Interstate [fol. 1412] Commerce Commission, and it was the duty of the District Court to apply such lawful State rate in awarding the restitution here sought.

(This point is applicable to Assignments of Error numbered 1 to 8 inclusive.)

6. When the District Court, pursuant to the mandate of the Supreme Court of the United States set aside the invalid order of the Interstate Commerce Commission which had attempted to supersede the State rate, viz., the Cummer Scale, the District Court should have awarded restitution upon the basis of the said State rate and thus righted the wrong which had resulted from its erroneous decree

without inquiring or hearing evidence as to whether the said State rate was reasonable or unreasonable, just or unjust, remunerative or confiscatory.

(This point is applicable to Assignments of Error, numbered 5 to 8 inclusive.)

7. In applying the common law standard of reasonableness, upon the issue of quantum meruit, to the charges for transportation services rendered in the past, the District Court in awarding restitution upon such standard should not have given consideration to (a) the State statutes, or (b) the Federal statutes, which relate to the making of rates to be established for future application.

(This point is applicable to Assignments of Error numbered 9 and 10.)

8. In applying the common law standard of reasonableness, upon the issue of quantum meruit, to the charges here involved, the District Court in awarding restitution [fol. 1413] upon such standard should not have given consideration to discrimination of any sort, either as between persons or localities or as against interstate commerce, under (a) the Florida statutes, or (b) the Federal statutes.

(This point is applicable to Assignments of Error numbered 11 to 14 inclusive.)

9. In applying the common law standard of reasonableness, upon the issue of quantum meruit, to the charges here involved, the District Court in awarding restitution upon such standard should have awarded to these cross-appellants, on behalf of the several shippers represented by them, greater sums than the sums so awarded to them on behalf of such shippers respectively in and by the final decree herein, viz.; not substantially less than the amounts of such overcharges claimed by these cross-appellants on behalf of such shippers respectively.

(This point is applicable to Assignments of Error numbered 15, 16 and 17.)

Parts of the Record Necessary for the Consideration of the Points Above Mentioned

And the said appellees and cross-appellants respectfully represent that the whole of the record is necessary for the

consideration of the points above specified, except the Exhibits numbered and identified in the evidence as follows:

Alston No. 1 to Alston No. 8, inclusive;
Alston No. 13;
Adair No. 10, Adair No. 11, and Adair No. 12;
Perrin No. 1 to Perrin No. 22, inclusive;
Lamb No. 3; Lamb No. 4; Lamb No. 8 to Lamb No. 22, inclusive, and Lamb No. 24 to Lamb No. 43 inclusive;
Warren No. 1 to Warren No. 18, inclusive;
Langley No. 1 and Langley No. 2;
[fol. 1414] Ledbetter No. 1 and Ledbetter No. 2;
A. C. L. No. 1; A. C. L. No. 2; A. C. L. No. 3;
Claimants' No. 1 to No. 4, inclusive;
Claimants' No. 1-A; No. 7-A; No. 9-A-1 to No. 9-A-10 inclusive; No. 10-A; No. 11-A; No. 17-A; No. 19-A; No. 21-A; No. 23-A; No. 25-A; No. 27-A; No. 31-A; No. 33-A; No. 35-A; No. 37-A; No. 39-A; No. 41-A; No. 47-A; No. 52-A to No. 62-A, inclusive; No. 67-A; No. 68-A; No. 69-A; No. 85-A to No. 89-A, inclusive; No. 92-A to No. 97-A, inclusive; No. 100-A; No. 101-A; No. 103-A; No. 105-A; No. 106-A and No. 108-A.

Defendant's No. 1-B to No. 8-B, inclusive; No. 10-B to No. 72-B, inclusive, and No. 74-B to No. 77-B, inclusive.

Respectfully submitted, Cary D. Landis, Attorney General of the State of Florida. Theo. T. Turnbull, Special Counsel for the Florida Railroad Commission.

[fol. 1415-1416] STATE OF FLORIDA,
County of Duval, ss:

Before me, a Notary Public for the State of Florida at Large, personally appeared C. G. Ashby, who being by me first duly sworn, deposes and says:

That on behalf of the above named appellees and cross-appellants on September 10th, 1934, he served the foregoing Separate Statement of Points and of the Parts of the Record which are Necessary for the Consideration Thereof upon United States of America, Interstate Commerce Commission, Georgia Public Service Commission and Atlantic Coast Line Railroad Company by depositing copies of said Statement, duly sealed in envelopes addressed respectively to:

Elmer B. Collins, Esquire, Assistant Attorney General, Department of Justice, Washington, D. C.

J. Stanley Payne, Esquire, Assistant Division Counsel, Interstate Commerce Commission, Washington, D. C.

Georgia Public Service Commission, State Capitol Building, Atlanta, Georgia.

Messrs. Alston, Alston, Foster & Moise, Citizens & Southern Bank Building, Atlanta, Georgia.

in the United States Post Office at Jacksonville, Florida, on said day, said affiant having theretofore affixed to said envelopes respectively sufficient uncancelled United States postage stamps to assure delivery thereof to said addressees.

C. G. Ashby.

Sworn to and subscribed before me this 10th day of September, A. D. 1934. Nell Hurst, Notary Public, State of Florida at Large. My Commission expires March 16, 1928. (Seal.)

[fol. 1417] [File endorsement omitted.]

[fol. 1418] IN SUPREME COURT OF THE UNITED STATES

October Term, 1934

No. 345

COUNTER-DESIGNATION OF CROSS-APPELLEES—Filed September 11, 1934

Comes now the cross appellee, Atlantic Coast Line Railroad Company, and states that, in addition to the parts of the record designated by the cross appellants, the following exhibits are necessary for consideration of this case and should be printed by the Clerk of this court in addition to those heretofore designated by the cross-appellants:

Title of paper	Exhibit No.
Opinion and order of Interstate Commerce Commission dated July 5, 1932, 186 I. C. C. 157.	Defendant's Exhibit 1-B
Opinion and order of Interstate Commerce Commission dated January 9, 1933, 190 I. C. C. 588.	Defendant's Exhibit 2-B

Title of paper	Exhibit No.
Opinion containing findings of fact and conclusion of law and decree of the United States District Court for the Northern District of Georgia, dated February 24, 1932.	Defendant's Exhibit 3-B

Respectfully submitted, Carl H. Davis, W. E. Kay, Robert C. Alston, Wm. Hart Sibley, Counsel for Atlantic Coast Line Railroad Company, Cross-Appellee. Alfred P. Thom, Alston, Alston, Foster & Moise, of Counsel.

[fol. 1419] STATE OF GEORGIA,
County of Fulton:

Before me, a Notary Public in and for the State of Georgia at Large, personally appeared William Hart Sibley, who, being by me first duly sworn, deposes and says that on behalf of the above and foregoing cross-appeal on September 15, 1934, he served the foregoing counter-designation of the parts of the record which are necessary for the consideration of the cause and necessary to be printed upon the United States of America, the Interstate Commerce Commission, the State of Florida, the Railroad Commission of the State of Florida, the Georgia Public Service Commission, Brooks-Scanlon Corporation, Wilson Cypress Company, Cummer Cypress Company, Wilson Lumber Company of Florida, by depositing copies of said counter-designation, duly sealed, in envelopes addressed respectively to Elmer B. Collins, Esq., Assistant Attorney General, Department of Justice, Washington, D. C.; J. Stanley Payne, Esq., Assistant Division Counsel, Interstate Commerce Commission, Washington, D. C.; Cary D. Landis, Esq., Attorney General, State Capitol, Tallahassee, Florida; Theo. T. Turnbull, Esq., Special Counsel for the Florida Railroad Commission, State Capitol, Tallahassee, Florida; J. R. L. Anderson, Assistant Attorney General, Georgia Public Service Commission, State Capitol, Atlanta, Georgia; Messrs. Knight, Adair, Cooper and Osborne, Atlantic National Bank Building, Jacksonville, Florida; J. V. Norman, Marion E. Taylor Building, Louisville, Kentucky; [fols. 1420 & 1421] in the United States Post Office in Atlanta, Georgia, on said date, said affiant having theretofore affixed to said envelopes respectively sufficient uncancelled

United States postage stamps to assure delivery thereof to said addressees.

Wm. Hart Sibley.

Sworn to and subscribed before me this the 15th day of September, 1934. Margery Davenport, Notary Public. Notary Public, Georgia, State at Large. My commission expires Dec. 24, 1936. (Seal.)

[fol. 1422] [File endorsement omitted.]

[fol. 1423] IN SUPREME COURT OF THE UNITED STATES

October Term, 1934

No. 344

October Term, 1934

No. 345

STIPULATION WITH REFERENCE TO PRINTING OF RECORD—Filed October 17, 1934

It is stipulated by the parties hereto that the following shall govern the printing of the record of the District Court in the appeal and cross-appeal in the above entitled causes.

1

Only one pleading shall be printed where identical allegations are made in the same pleading filed in each of the constituent causes, with appropriate notation to the effect [fol. 1424] that the allegations of the other pleadings are identical except as to name of the party.

2

Omit from printing all exhibits specified in the record under cross-appeal, it being agreed that fifteen (15) printed, or photostatic, or stencilled, or planographic, or otherwise reproduced, copies of the following exhibits shall, not later than five days before the cause comes up for argument in the Supreme Court, be furnished by cross-appellants to the

Clerk of the Supreme Court and a copy thereof delivered to attorneys for the appellants and cross-appellees and shall be suitably bound for submission to the Justices of the Supreme Court, and which shall have the same force and effect and be treated for all purposes as if they were a part of the printed transcript of the record, to-wit:

Adair	# 4
Lamb	# 1
Lamb	# 2
Lamb	# 5
Lamb	# 6
Lamb	# 7
Lamb	# 23
Ingram	# 1
Claimants	# 2-A
Claimants	# 12-A-1
Claimants	# 12-A-2
Claimants	# 15-A
Claimants	# 16-A
"	# 18-A
"	# 20-A
"	# 22-A
"	# 24-A
"	# 26-A
"	# 28-A
"	# 29-A
"	# 30-A
"	# 32-A
"	# 34-A
"	# 36-A
"	# 38-A
"	# 40-A
"	# 42-A
"	# 43-A
"	# 44-A
"	# 45-A
"	# 46-A
"	# 49-A
"	# 50-A
"	# 63-A
"	# 64-A
"	# 66-A

" # 70-A to # 84-A, inclusive
" # 102-A
" # 104-A to # 104-A-11, inc.
Defendant's # 1-B
" # 2-B
" # 3-B
" # 73-B
Claimant's # 107-A

3

In lieu of the printing of the following exhibits, the following notations shall be printed in the record:

[fol. 1425]

Exhibit No.	Notation
Adair Exhibit No. 5	"Adair Exhibit No. 5 is the identical order of the Florida Railroad Commission, dated March 5, 1931, attached as an exhibit to the amendment to the complainants' original motions for restitution and as such printed in this record."
Claimants' Exhibit No. 13-A	"Claimants' Exhibit No. 13-A is a reproduction of the distance scale and the scale of rates shown in Column B of Exhibit 52 (pages 394–395) of the original record on the former appeal, to-wit: Florida et al. v. United States, et al., Nos. 493, 494 and 495, October Term, 1929."
Claimants' Exhibit No. 14-A	"Claimants' Exhibit No. 14-A is a reproduction of the distance scale and the scale of rates shown in Column B of Exhibit 23 (pages 288–290) of the original record on the former appeal, to-wit: Florida et al. v. United States et al., Nos. 493, 494 and 495, October Term, 1929."
Claimants' Exhibits Nos. 5, 6, 9, 11, 14 and 15, 3-A, 4-A, 5-A, 6-A and 8-A.	"Claimants' Exhibits Nos. 5, 6, 9, 11, 14 and 15, 3-A, 4-A, 5-A, 6-A and 8-A are tariffs published by various railroads, the Exhibit Number, the tariff number, the railroad or railroads publishing such tariffs, the effective date of such tariffs, the scales of rates so published, and the territorial application of such rates being as follows:

[fol. 1426]

Exhibit Number	Tariff Number	Railroad	Effective Date	Rate	Application
#5	ICC No. 9019 (Supp. 17)	St. Louis-San Francisco Ry. Co.	8/23/32	Per car regardless of weight 25 mi. & less $12.00 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 22.50	Between all points in Alabama Florida, and Mississippi, except not applicable on Mississippi intrastate traffic.
#6	ICC No. A-10448 (Supp. 2)	Southern Railway Co.	9/15/32	Per car regardless of weight 25 mi. & less $12.00 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 20.00	To Memphis, Tenn., from Southern Ry. stations between Memphis, Tenn., and Corinth, Miss., including Corinth.
#9	Rate Issue No. 41296 (Supp. 7)	Nashville, Chattanooga & St. Louis Ry. Co.	10/ 6/32	Per car regardless of weight 25 mi. & less $12.00 50 " " over 25 mi. 15.00 75 " " " 50 mi. 17.50 100 " " " 75 " 20.00	On intrastate traffic in Tennessee.
#14	ICC No. 7786 (Supp. 3)	Illinois Central Railroad Co.	6/ 3/32	Per car regardless of weight 25 mi. & less $12.00 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 20.00	To Corinth, Miss.; Fernwood, Miss.; Granada, Miss.; Jackson, Miss.; McComb, Miss.; Pickens, Miss.; Water Valley, Miss.; Dyersburg, Tenn.; Jackson, Tenn.; Ponchatoula, La., from Illinois Central stations.

[fol. 1427]

Exhibit Number	Tariff Number	Railroad	Effective Date	Rate	Application
#14	ICC No. 3284-A	Nashville, Chattanooga & St. Louis Railway	10/ 6/32	Per car regardless of weight 25 mi. & less $12.00 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 20.00	All stations except on Alabama, Georgia, and Tennessee intrastate traffic.
#14	ICC No. 7810 (Supp. 4)	Yazoo & Mississippi Valley Railroad	9/27/32	Per car regardless of weight 25 mi. & less $12.00 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 20.00	To Charleston, Miss. Clarksdale, " Gloster, " Greenville, " Greenwood, " Grenada, " Hickory, " Holcomb, " Jackson, " Kings, " Lambert, " Meridian, " Natchez, " Phillipp, " Stevenson, " Tehula, " Trotters Point " Vicksburg, " Yazoo City, " Denham Springs, La. From Yazoo & M. V. stations east of Mississippi River.

[fol. 1428]

Exhibit Number	Tariff Number	Railroad	Effective Date	Rate	Application
#14	ICC-B-860 (Supp. 1)	Mobile & Ohio Rd. Co.	9/28/32	Per car regardless of weight 25 mi. & less $12.00 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 20.00	To Columbus, Miss. Corinth, " Meridian, " Humboldt, Tenn. Jackson, " Mobile, Ala. Whistler, " Wickliffe, Ky. From Mobile & Ohio stations in Alabama, Tennessee, Kentucky and Mississippi.
#11	ICC-2848	Central of Ga. Ry. Co.	10/10/32	Per car regardless of weight 25 mi. & less $14.50 50 " " over 25 mi. 17.50 75 " " " 50 " 20.00 100 " " " 75 " 22.50	To Montgomery, Ala. From Central of Georgia Railway Stations.
#15	ICC-9639	St. Louis-San Francisco Ry. Co.	8/31/32	Per car regardless of weight 25 mi. & less $17.00 50 " " over 25 mi. 20.00 75 " " " 50 " 22.50 100 " " " 75 " 27.50	Between Memphis, Tenn., and stations in Arkansas—Missouri.
#15	ICC-9195 (Supp. 28)	St. Louis-San Francisco Ry. Co.	8/23/32	Per car regardless of weight 25 mi. & less $12.00 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 22.50	To Memphis, Tenn., from stations in Tennessee and Mississippi.
#15	ICC 9640	St. Louis-San Francisco Ry. Co.	9/ 3/32	Per car regardless of weight 25 mi. & less $12.00 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 22.50	Between stations in Missouri.

[fol. 1429]

#15	ICC 9638	St. Louis-San Francisco Ry. Co.	8/31/32	Per car regardless of weight 25 mi. & less $12.00 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 22.50	To Cape Girardeau, Mo., from stations in Arkansas and Missouri.
#15	ICC 9346 (Supp. 17)	St. Louis-San Francisco Ry. Co.	8/25/32	Per car regardless of weight 25 mi. & less $12.00 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 22.50	Between stations in Arkansas and between stations in Arkansas on the one hand and stations in Missouri on the other.
#15	ICC 9346 (Supp. 21)	St. Louis-San Francisco Ry. Co.	3/ 5/33	Per car regardless of weight 25 mi. & less $12.00 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 22.50	To Paris, Texas from named points in Oklahoma.

[fol. 1430]

#3-A	ICC-752	Florida East Coast Railway	8/20/31	5 mi. & under $5.85 10 " " over 5 mi. 7.20 20 " " " 10 " 9.50 Per car of 40,000 lbs. Excess in Proportion.	To Osceola, Florida. Melbourne, " and Wabasso, "
#3-A	ICC-788	Florida East Coast Railway	5/19/32	5 mi. & under $5.85 10 " " over 5 mi. 7.20 20 " " " 10 " 9.50 30 " " " 20 " 11.00 40 " " " 30 " 11.50 50 " " " 40 " 13.00 60 " " " 50 " 14.00 70 " " " 60 " 15.00 80 " " " 70 " 16.00 90 " " " 80 " 17.00 Per car of 40,000 lbs. Excess in Proportion.	To Jacksonville, Florida.
#3-A	G.F.O.-A-95	Apalachicola Northern Railroad.	3/20/31	$3.20 per 1,000 ft.	From 13 stations to Apalachicola, Florida.

Exhibit Number	Tariff Number	Railroad	Effective Date	Rate	Application
#3-A	G.F.O.-A-46 (Supp. T)	Apalachicola Northern Railroad	11/24/30	Cents per 100 lbs. 30 mi. & under 3.5 45 " " over 30 mi. 4.0 60 " " " 45 " 4.5 100 " " " 60 " 5.0 160 " " " 100 " 5.5	Applicable on resinous waste wood between all stations.
[fol. 1431]					
#3-A	ICC 90	South Georgia Ry.	8/18/29	Cents per 100 lbs. 7 mi. & less 2.0 27 " " over 7 mi. 2.5 57 " " " 27 " 3.5 67 " " " 57 " 4.0 82 " " " 67 " 4.5	All stations.
#3-A	G.F.O.-108 (Supp. O)	Atlanta & St. Andrews Bay Ry. Co.	11/10/32	Cents per 100 lbs. 60 mi. & less 3.5	Applicable on stumps and resinous wood between all stations in Florida.
#3-A	Fla. Local Tariff #6-(Supp. 2)	Alabama & Western Florida Railroad.	4/15/31	$7.00 per car of 12 cords. Excess in Proportion.	Applicable on pulpwood from 11 stations in Florida to Chipley, Florida.
#4-A	ICC 7789	Gulf & Ship Island Railroad	5/18/32	Per car regardless of weight 25 mi. & less $12.00 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 20.00	To Jackson, Mississippi and Laurel, Mississippi.
#4-A	ICC-A-8212	Missouri Pacific Railroad	10/13/32	Per car regardless of weight 25 mi. & less $12.00 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 22.50	Between all stations in Arkansas, Louisiana, Missouri and Oklahoma.

[fol. 1432]

#4-A	ICC 4676 (Supp. 8)	St. Louis-Southwestern Railway	1/ 6/33	Per car regardless of weight 25 mi. & less $12.00 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 22.50	Between all stations in Arkansas, Louisiana, and Missouri (except St. Louis, Missouri).
#4-A	ICC 4676 (Supp. 8)	St. Louis-Southwestern Railway	1/ 6/33	Per car regardless of weight 25 mi. & less $22.00 50 " " over 25 mi. 25.00 75 " " " 50 " 27.50 100 " " " 75 " 32.50	To Memphis, Tennessee, from stations in Arkansas.
#4-A	ICC-A-650 (Supp. 120)	Tennessee, Alabama & Georgia Railway	2/15/33	Per car regardless of weight 25 mi. & less $12.50 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 20.00	To Chattanooga, Tennessee, and Gadsden, Alabama.
#4-A	ICC 36 (Supp. 11)	Columbus & Greenville Railway	1/16/33	Per car regardless of weight 25 mi. & less $12.00 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 20.00 125 " " " 100 " 22.50 150 " " " 125 " 25.00 170 " " " 150 " 27.50	To Columbus, Greenville, Greenwood, Means and West Point, Mississippi.

[fol. 1433]

#4-A	ICC 1137	Gulf-Mobile & Northern Railroad	5/ 9/32	Per car regardless of weight 25 mi. & less $12.50 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 22.50	All stations

Exhibit Number	Tariff Number	Railroad	Effective Date	Rate	Application
#4-A	ICC-A-16022 (Supp. 19)	Louisville & Nashville Railroad	1/27/33	Per car regardless of weight 25 mi. & less $12.00 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 20.00	All stations except Alabama intrastate traffic and except between points in Illinois, Indiana, Missouri and/or Ohio.
#4-A	ICC-A-760	Norfolk Southern Railroad	5/15/31	Cents per 100 lbs. 50 mi. & under 3 100 " " over 50 mi. 4 150 " " " 100 " 5 200 " " " 150 " 6	Applicable on lumber for creosoting in transit at Norfolk, Virginia.
#4-A	ICC-A-7528 (Supp. 9)	Seaboard Air Line Railway	12/11/33	3.5 cents per 100 lbs. Minimum car 80,000 lbs.	From Fitz Siding, North Carolina, to Norfolk and Suffolk, Virginia.
#4-A	ICC-A-10425 (Supp. 5)	Southern Railway	9/26/32	Per car regardless of weight 25 mi. & less $12.50 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 20.00	To Chattanooga, Tennessee, from various Southern Ry. stations and various Alabama Great Sou. Rd. stations and various Cincinnati, New Orleans and Texas Pacific Ry. stations.
[fol. 1434]					
#4-A	ICC-A-10425 (Supp. 7)	Southern Railway	12/31/32	Per car regardless of weight 25 mi. & less $14.50 50 " " over 25 mi. 17.50 75 " " " 50 " 20.00 100 " " " 75 " 22.50	To Mobile, Selma, and York, Alabama, from Southern Railway and Alabama Great Sou. Rd. stations in Alabama and Mississippi.
#4-A	ICC-A-10425 (Supp. 7)	Southern Railway	12/31/32	Per car regardless of weight 25 mi. & less $12.50 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 20.00	To Knoxville, Tennessee, Dayton, Tennessee, and Fayette, Alabama, from Southern Ry. stations, Alabama, Great Sou. Rd. stations and Cincinnati, New Orleans and Texas Pacific Ry. stations.

#4-A	ICC 2867	Central of Georgia Railway	2/23/33	Per car regardless of weight 25 mi. & less $12.00 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 20.00	To Dothan, Alabama, and Montgomery, Alabama.
#5-A	ICC-A-7528 (Supp. 8)	Seaboard Air Line Railway	8/10/32	Minimum Car 4,000 ft. $2.50 per 1,000 ft.	To Boykins, Virginia from points between and including Branchville, Virginia, and Littleton, North Carolina.
				$2.50 per 1,000 ft.	To Boykins, Virginia from stations between and including Boykins, Virginia, and Lewiston, North Carolina.

[fol. 1435]

#5-A	ICC-C-12292	Chicago, Rock Island & Pacific Ry. Co.	2/10/32	Per car regardless of weight 25 mi. & less $12.00 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 22.50	Between stations in Arkansas and Louisiana.
				25 mi. & less $17.00 50 " " over 25 mi. 20.00 75 " " " 50 " 22.50 100 " " " 75 " 27.50	To Memphis, Tennessee, from stations in Arkansas and Louisiana.
#6-A	Tariff #44-D	Alabama, Tennessee & Northern Rd.	10/18/32	Per car regardless of weight 25 mi. & less $12.00 50 " " over 25 mi. 15.00 75 " " " 50 " 18.00	To Russwood, Alabama.
#6-A	Log & Timber Tariff #9 (Supp. J)	Nashville, Chattanooga & St. Louis Railway	7/28/32	Per car regardless of weight 25 mi. & less $12.00 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 20.00	On intrastate traffic in Alabama.

Exhibit Number	Tariff Number	Railroad	Effective Date	Rate	Application
#6-A	Tariff #14-A (Supp. 20)	Alabama, Tennessee & Northern Rd.	2/ 7/33	Per car regardless of weight 25 mi. & less $14.50 50 " " over 25 mi. 17.50 75 " " " 50 " 20.00 100 " " " 75 " 22.50 118 " " " 100 " 24.00	To Mt. Vernon and York, Alabama.
[fol. 1436]					
#6-A	Tariff #7-B (Supp. 26)	Alabama, Tennessee & Northern Railroad Co.	2/20/33	Cents per 100 lbs. 60,000 lbs. car / 80,000 lbs. car 10 miles & less 2.5 / 2.0 20 mi. & over 10 mi. 3.0 / 2.5 30 " " " 20 " 3.0 / 2.5 40 " " " 30 " 3.5 / 3.0 55 " " " 40 " 4.0 / 3.5 70 " " " 55 " 4.5 / 4.0 100 " " " 70 " 5.0 / 4.5 120 " " " 100 " 5.5 / 4.5 140 " " " 120 " 6.0 / 5.0 160 " " " 140 " 6.5 / 5.5 180 " " " 160 " 7.0 / 6.0 200 " " " 180 " 7.0 / 6.0 220 " " " 200 " 7.5 / 6.5	To Mobile, Alabama.
#8-A	ICC-B-2745	Atlantic Coast Line Railroad	12/10/32	Cents per 100 lbs. 100 miles 2.5 125 mi. & over 100 mi. 3.5 175 " " " 125 " 4.5	Net transit rates to Montgomery, Alabama, for milling, creosoting, storing, trimming and/or dressing in transit of cross arms, cross ties, lumber, piling, poles, and timber N. O. S.
#8-A	ICC-B-2745 (Supp. 1)	Atlantic Coast Line Railroad	1/10/33	Cents per 100 lbs. 1, 1.5, 2.5 and 3	To Charleston, South Carolina, from various South Carolina points. Same transit application as above to Montgomery.

[fol. 1437]

#8-A	ICC-A-7630	Seaboard Air Line Railway	8/25/32	Per car regardless of weight 25 mi. & less $14.50 50 " " over 25 mi. 17.50 75 " " " 50 " 20.00 100 " " " 75 " 22.50	To Montgomery, Alabama, from stations between Omaha, Georgia, and Montgomery.
#8-A	ICC-115	Savannah & Atlanta Railway	7/14/30	Cents per 100 lbs. 25 miles & less 2.5 50 " & over 25 mi. 3.0 75 " " " 50 " 3.5	To East Warrenton, Sardis, and Newington, Georgia.
#8-A	ICC-484	Georgia & Florida Railway	5/15/25	Cents per 100 lbs. 50 mi. & less 2.5 75 " " over 50 mi. 3.0 100 " " " 75 " 3.5 160 " " " 100 " 4.0 200 " " " 160 " 4.5	All stations on Georgia and Florida Railway and Stateboro Northern Ry.
#8-A	ICC-3101	New Orleans & Northwestern Railroad Co.	7/26/32	Per car regardless of weight 25 mi. & less $12.50 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 22.50	To Laurel, Mississippi.

[fol. 1438]

#8-A	ICC-A-129	Western Railway of Alabama	10/12/32	Per car regardless of weight 25 mi. & less $14.50 50 " " over 25 mi. 17.50 75 " " " 50 " 20.00 100 " " " 75 " 22.50	To Montgomery and Selma, Alabama.
#8-A	ICC-2851	Central of Georgia Railway	9/27/32	Cents per 100 lbs. 50 mi. & less 2.5 75 " " over 50 mi. 3.0 100 " " " 75 " 3.5	To Augusta and Waynesboro, Georgia.

Exhibit Number	Tariff Number	Railroad	Effective Date	Rate	Application
#8-A	ICC-A-10467	Southern Railway	8/12/32	Cents per 100 lbs. 1, 1.5 and 2	Transit rates on lumber and articles taking same rate for milling and creosoting to Charleston, South Carolina, from various South Carolina points.
#8-A	ICC-A-10472	Southern Railway	9/15/32	Per car regardless of weight 25 mi. & less $12.00 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 20.00	To Corinth, Mississippi, from various Southern Railway stations.
[fol. 1439]					
#8-A	ICC-7835 (Supp. 10)	Illinois Central Railroad	4/ 6/33	Per car regardless of weight 25 mi. & less $12.00 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 20.00	To Durant, Mississippi; East Cairo, Kentucky; Henderson, Kentucky; Hickman, Kentucky; Hopkinsville, Kentucky; Paducah, Kentucky; Vaiden, Mississippi.
#8-A	ICC-7798 (Supp. 2)	Illinois Central Railroad	8/31/32	Per car regardless of weight 25 mi. & less $17.00 50 " " over 25 mi. 20.00 75 " " " 50 " 22.50 100 " " " 75 " 27.50	To Memphis, Tennessee; from stations on Illinois Central Railroad and Yazoo & M. V. Railroad.
#8-A	ICC-7811 (Supp. 2)	Yazoo & Mississippi Valley Railroad	10/26/32	Per car regardless of weight 25 mi. & less $12.00 50 " " over 25 mi. 15.00 75 " " " 50 " 17.50 100 " " " 75 " 20.00	Between stations in Louisiana west of the Mississippi River.

[fol. 1440]

Exhibit No.	Notation
Claimants' Exhibit No. 65.	"Claimants' Exhibit No. 65 is a tariff of the Louisville & Nashville Railroad Company, which was in effect during the years 1929, 1930 and 1931, offering to enter into agreements with any responsible person, firm or corporation for the operation by such person, firm or corporation of log trains over any of the following portions of the lines of the Louisville & Nashville Railroad upon payment of the following amounts for such trackage rights:

Rate of payment	Application
5.4 cents per loaded car per mile for distances up to 25 miles, and 3.6 cents per loaded car per mile for distances over 25 miles and up to 50 miles, with no charge for the return empty movement.	Alabama & Florida Division, Florala Branch, Lakewood Branch, Southern Alabama Division, Camden Branch, Myrtlewood Branch, Pensacola & Atlantic Division, or Yellow River Branch.

Exhibit No.	Notation
Claimants' Exhibit No. 51-A	"Claimants' Exhibit No. 51-A is a contract, dated September 2, 1929, between Live Oak, Perry & Gulf Railroad Company and Brooks-Scanlon Corporation, whereby Brooks-Scanlon Corporation was given the right to operate its log trains over the tracks of said Railroad Company between Dowling Park and Mandalay, Florida, upon payment to the Railroad Company of the sum of $1.20 per loaded train mile, in trains of 20 cars or less, trains of more than 20 cars to be charged for in proportion, with no charge for the empty return movement."
Claimants' Exhibit No. 90-A	"Claimants' Exhibit No. 90-A is a contract, dated May 20th, 1919, between Florida East Coast Railway Company and Osceola Cypress Company, whereby Osceola Cypress Company was given the right to operate its log trains over the Okeechobee Branch of the tracks of said Railway Company in Florida upon payment of the following charges per loaded car, with no charge for the return empty movement:

[Fol. 1441]

10 miles and under	$2.50
20 miles and over 10 miles	3.00
25 miles and over 20 miles	3.50
45 miles and over 25 miles	4.00
55 miles and over 45 miles	4.50
60 miles and over 55 miles	5.00
70 miles and over 60 miles	5.50
75 miles and over 70 miles	6.00
85 miles and over 75 miles	6.50
100 miles and over 85 miles	7.00
115 miles and over 100 miles	7.50

The same Exhibit shows that the contract was revised on June 8, 1928, so that the charges per loaded car, with no charge for the return empty movement, were thereafter:

20 miles and under	$.07 per car mile
50 miles and over 20 miles	.06¼ per car mile
115 miles and over 50 miles	.05 per car mile"

Claimants' Exhibit No. 91-A

"Claimants' Exhibit No. 91-A is a contract, dated June 21, 1929, between the South Georgia Railway Company and Gibson-Justus Company, whereby Gibson-Justus Company was given the right to operate its log trains over the lines of said Railway Company between Greenville, Florida, and Shady Grove, Florida, upon payment of the following charges per month for transporting logs producing an average of not more than 30,000 feet board measure of lumber per day:

7 miles and under	$250.00
12 miles and over 7 miles	256.00
17 miles and over 12 miles	263.00
22 miles and over 17 miles	350.00
27 miles and over 22 miles	388.00
32 miles and over 27 miles	425.00
37 miles and over 32 miles	463.00
43 miles and over 37 miles	513.00

Exhibit No.	Notation
	If the logs so hauled produced an average of more than 30,000 feet of lumber per day then such excess should be paid for at the following rate per thousand feet:

7 miles and under	$.19
12 miles and over 7 miles	.21
17 miles and over 12 miles	.24
22 miles and over 17 miles	.26
27 miles and over 22 miles	.31
32 miles and over 27 miles	.32
37 miles and over 32 miles	.35
43 miles and over 37 miles	.36"

[fol. 1442]

Claimants' Exhibit No. 98-A	"Claimants' Exhibit No. 98-A is a contract, dated October 25, 1925, between Seaboard Air Line Railway Company and Roux Crate Company, Inc., whereby Roux Crate Company, Inc., was given the right to operate its log trains over the tracks of said Railway Company between Ridgewood Junction, Florida, and Lake Garfield, Florida, upon payment to the Railway Company of the sum of $1.00 per loaded truck, with no charge made for the empty return movement."
Claimants' Exhibit No. 99-A	"Claimants' Exhibit No. 99-A is a contract, dated November 1, 1925, between Charlotte Harbor & Northern Railway Company and Roux Crate Company, Inc., whereby Roux Crate Company, Inc. was given the right to operate its log trains over the tracks of said Railway Company between Ridgewood Junction, Florida, and Ft. Green Springs, Florida, upon payment to the Railway Company of the sum of $1.50 per loaded truck, with no charge made for the empty return movement."
Claimants' Exhibit No. 100-A	"Claimants' Exhibit No. 100-A is a contract, dated September 9, 1931, between L. R. Powell, Jr., and E. W. Smith, as Receivers of Seaboard Air Line Railway Company, and Roux Crate Company, whereby Roux Crate Company was given the right to operate its log trains over the tracks of said Railway Company, from a point

Exhibit No. Notation

to be designated by the Receivers on their Fort Myers line in Charlotte County, Florida, to Lake Garfield, Florida, upon payment to the said Receivers of the sum of $2.50 per loaded truck, with no charge made for the empty return movement."

4

It is further stipulated and agreed that counsel for any of the parties may in their briefs or arguments refer to any pleading or any portion thereof, or to any Exhibit or any portion thereof, on file with the Clerk of the Supreme Court, [fols. 1443 & 1444] introduced in evidence in the District Court, that is not included in the printed transcript of the record in this court and not included in the aforesaid list of Exhibits, and that such pleadings and exhibits, or portions thereof, so referred to shall have the same force and effect and be treated for all purposes as if they were parts of the printed transcript of the record herein.

5

With the above exceptions, the entire record now on file shall be printed in the customary manner.

In witness whereof counsel for the parties hereto have hereunto executed this writing this the 12th day of October, 1934.

Elmer B. Collins, Special Assistant to the Attorney General of the United States. Cary D. Landis, Attorney General, State of Florida. —— ——, Counsel for the Interstate Commerce Commission. Theo. T. Turnbull, Special Counsel for the Florida Railroad Commission. J. J. E. Anderson, Assistant Atty. Gen., assigned to P. E. C., Counsel for the Georgia Public Service Commission. H. P. Adair, J. V. Norman, August G. Gutheim, R. A. Baker, C. G. Ashby, Counsel for Brooks-Scanlon Corporation, Wilson Cypress Company, Cummer Cypress Company, and Wilson Lumber Company. Carl H. Davis, W. E. Kay, Robert C. Alston, Wm. Hart Sibley, Counsel for the Atlantic Coast Line Railroad Co.

[fols. 1445 & 1446] [File endorsement omitted.]

[fols. 1447 & 1448] [File endorsement omitted.]

[fol. 1449] IN UNITED STATES DISTRICT COURT IN AND FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

In Equity

Consolidated Cause No. 514

STATE OF FLORIDA and E. S. MATTHEWS, MAMIE EATON-GREENE, and W. D. DOUGLASS, as and constituting the Florida Railroad Commission; Brooks-Scanlon Corporation; Cummer Cypress Company, Wilson Cypress Company and Wilson Lumber Company of Florida; and E. S. Matthews, Mamie Eaton-Greene and W. B. Douglass, as and constituting the Florida Railroad Commission, for the use and benefit of the several shippers named in paragraph III of the final decree of restitution, Complainants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ATLANTIC COAST LINE RAILROAD COMPANY, ET AL., Defendants

Narrative Statement of Evidence—Filed Sept. 1, 1934

Hearing Held Before Special Master January 29th and 30th, 1932

APPEARANCES OF COUNSEL

Messrs. H. P. Adair and C. G. Ashby, of Knight, Adair, Cooper & Osborne, Jacksonville, Florida; Mr. Charles E. Cotterill, New York and Atlanta; Mr. August G. Gutheim, Washington, D. C., for Cummer Cypress Company and Wilson Cypress Company.

[fol. 1450] Mr. J. V. Norman, of Messrs. Norman, Quirk & Graham, Louisville, Kentucky, for Wilson Lumber Company of Florida.

Mr. T. T. Turnbull, Tallahassee, Florida, for State of Florida on behalf of numerous Florida log shippers.

Mr. R. A. Baker, of Messrs. Baker & Baker, Jacksonville, Florida, for Brooks-Scanlon Corporation.

Mr. Robt. C. Alston, of Messrs. Alston, Alston, Foster & Moise, Atlanta, Ga., for Atlantic Coast Line Railroad Company.

Before Hon. Horace M. Holden

COLLOQUY

Mr. Alston: If Your Honor please, the claims were filed running into many hundreds of papers and thousands of items and we had an understanding that those claims would be checked by the accounting department of the Atlantic Coast Line Railroad Company, and where there were any differences they would be re-checked. These differences have all been reconciled except three items, which are of so little importance that I think we can say they have all been reconciled. There is a claim filed by the Brown Brothers Company, J. D. Adkins, Trustee, which was reconciled at $425.10; the claim of Gress Manufacturing Company at $357.21 and filed for $321.93. Our pleadings put it at the larger amount. The Southeastern Hardwood Company's [fol. 1451] claim was reconciled—we understand was filed at $4,324.45 and we have put it in at the reconciled figure. With those three differences, there is no difference in the other statements, as I take it.

Court: Before we leave that, can there be any agreement as to what amounts I should treat in there as proper amounts.

Mr. Alston: I think you had better treat the amounts set up in our response as the proper amounts because that is against our interest in a few dollars. We have prepared a response which is identical in each case, each claim, except as to the amount of the claims, and some such like claim, and I believe that is really the only difference. This response is supplemental to the response filed heretofore before the Three Judge Court. It does not eliminate anything which remains in this response and amended response. This is intended to be supplemental to what extent there is differences, if any, to be explained to you as it develops; so we tender now the response of the Atlantic Coast Line Railroad Company to each claim, and this has been served upon all of the parties.

Court: All of these are independent and separate?

Mr. Alston: Yes, sir, each response. Thirty-one of such answers to claims were introduced, entitled: "In the Dis-

trict Court of the United States for the Northern District of Georgia, Atlanta Division. No. 514—Equity. State of Florida, and A. S. Wells, E. S. Mathews, and Mamie G. Eaton, as and constituting Railroad Commission of Florida, et al., complainants, vs. United States of America, Interstate Commerce Commission, et al., defendants. Answer [fol. 1452] of Atlantic Coast Line Railroad Company to Claim of ——."

Defendant's Exhibit No. 1.

Mr. Adair: If the Court please, I think in a somewhat extended observation of my friend Mr. Alston in his responses, some are unusual and it is largely upon that theory that the claimants have made some extended observations in their objections to these new papers that Mr. Alston has filed here. In these objections and replies which have been filed, I think Your Honor will find them somewhat helpful in following this case as we now understand to be the case. We are trying to set up in a broad and general way the complications that once existed in this case before the Supreme Court of the United States in the main litigation. In them we have embodied motions to strike to all and various parts of the replies that are filed by Mr. Alston upon the theory that we do not, or they are not as we see it, by any reason whatever, good evidence as to why our friend, the Atlantic Coast Line Railroad Company, should not restore to us the benefits of the decree of the United States District Court for the Northern District of Georgia, as originally entered in this case. Our papers are somewhat similar in this, that the principal lumber company claimants, that is to say, those who have a direct active part in the litigation in this Court and in the Supreme Court of the United States, each filed separate replies to Mr. Alston, separate papers with respect to the claims of these particular lumber companies. Now when it comes to the State, however, I believe we have already sent to you, a paper prepared and filed by the State, that general paper in reply to all of the various documents filed by Mr. Alston with respect to the claims of the claimants which were represented before the Railroad Commission in this proceeding. The State paper I believe has been sent to you. These now tendered are of the Brooks-Scanlon [fol. 1453] Corporation, The Wilson Cypress Company and

the Cummer Cypress Company, tendered as Adair exhibits 1, 2 and 3.

Mr. Norman: If Your Honor pleases, I am here for the Wilson Lumber Company of Florida. I want to say that while I know of no equity rules that prevent pleadings before the Master, I don't know whether these are pleadings of any real sense, whether they be pleadings or just memorandums for the benefit of the Master. They have been filed by the defendant in the form of an answer to the claims and we desire to file a reply to that answer. A copy of this reply was furnished counsel for the Atlantic Coast Line Railroad and was also furnished to Your Honor. The reply that I filed is exactly as these copies except this has been verified. Just in that connection, if Your Honor please, if I could have that paper, that copy I sent you, now that the original is filed, I would like to have it.

Filed as Norman Exhibit No. 1.

Mr. Turnbull: If the Court please, as counsel for the Florida Railroad Commissioners, I wish to file these objections and reply of the State of Florida, and the Florida Railroad Commissioners, to the answers of the Atlantic Coast Line Railroad Company, to the claims filed by us on behalf of the various claimants.

Filed as Turnbull Exhibit No. 1.

(The answers of Atlantic Coast Line Rd. Co. to the claims of the claimants which were filed as "Defendant's Exhibit No. 1" and "Adairs exhibits 1, 2, and 3" and "Norman's exhibit No. 1" and "Turnbull's exhibit No. 1", were pleadings and not exhibits. This error was corrected by motion of Atlantic Coast Line Railroad Company and these papers were allowed to be filed as pleadings rather than exhibits by order of the United States District Court of December 29, 1933.)

Court: Is there any testimony to be introduced today?

Mr. Adair: If the Court please, we have this to introduce. [fol. 1454] It is headed: "In re Proposal to adopt a special rule relating to discontinuency of rates, facilities, privileges and services of common carriers, telegraph and telephone companies in the State of Florida."

Adair Exhibit No. 4.

The purpose of this order is to show, or to show by this order that not only was this rate the legal and lawful state rate, voluntarily initiated by the carrier nearly 20 years ago and published according to law and thus was the legal rate, but that any and all other rates by virtue of the rules of the Florida Commission legally adopted in due course became the lawful rate as well. I will now read to your Honor what I consider to be the pertinent parts of this order. (Reading from Exhibit 4.)

Our view is that under that rule and under the Statute of the State of Florida, the Florida Railroad Commission itself is powerless to change any rate which has thus become a legal and lawful rate, without notice and a hearing had upon such change. That is, it is declared further by the Supreme Court of the United States to be in force and effect voluntarily established and is in force and effect.

Court: Is the effect of that order to put in effect the Cummer Scale?

Mr. Adair: No, sir. It has been in effect a good many years, since 1914 and 1915.

Court: I know, but does that undertake to continue it?

Mr. Adair: The purpose and effect of it, as we see it, is to explain that no departure can be made from that rate. [fol. 1455] The effect of that order is first, to make that rate occupy the same status as a rate prescribed by the Florida Commission, that is to say, a legal, as well as a lawful rate. The second is that it is declared that no change can be made in that rate unless and until the consent of the Florida Railroad Commission shall have been secured, and without the consent of the Florida Railroad Commission under the Statute, as we see it, that rate cannot be changed unless and until a hearing has been had, notice given and the consent of the Florida Railroad Commission given pursuant to that notice and hearing.

Court: As I understand it that rate was in force by the acquiescence of the Florida Commission and this makes it by order.

Mr. Adair: Yes, sir, this endorses it and embodies it into the schedule of rates and makes it a lawful rate. I say, there were rules substantially like that in effect long before this 1927 rule was adopted but I consider them to be immaterial in that this order of the Interstate Commerce Commission was not entered until long after this rule 16 was

adopted. It was adopted as rule 16 but later changed to special rule No. 1. The certificate relates all of that. We next offer in evidence an order of the Florida Railroad Commission entered under date of March 5, 1931. This order, Your Honor, is attached to and made a part of the amended motion for restitution filed by all of the various claimants, including the Florida Railroad Commission before the Three Judge Court, which was not in evidence, and therefore we have procured and will now tender (P. 10 of testimony) for filing in evidence a certified copy of this order No. 1032, dated March 5, 1931, introduced as Adair Exhibit No. 5.

[fol. 1456] Mr. Alston: On the part of the Atlantic Coast Line Railroad Company, we object to certain declarations in this writing, we do not object to that which is in the order, we have objections to the declarations in the preamble, beginning on the first page, paragraph 2, beginning with: "And it further appearing to this Commission and this Commission finding that the purpose of said order", and continuing on through that paragraph and also through the next paragraph, page 1, beginning "and it further appearing to this Commission and this Commission finding that this Commission deeming that the order of the Interstate Commerce Commission was unlawful," and through the paragraph and to the next paragraph beginning with the same words and "further appearing to this commission and this Commission finding, after divers proceedings in said United States District Court", and continuing on and to the next paragraph beginning with the same language and to the next paragraph No. 5, and we object to the declaration in the paragraph next after that, No. 6, and to paragraph on page 3 of this order, which reads as follows: "Said Cummer Scale on and at all times since February 8th, 1929, has been and still is in force and effect, upon the lines of the said Atlantic Coast Line Railroad Company in the State of Florida, and applicable between all stations on such lines within and throughout the State of Florida without exception", continuing on through the paragraph. We object to the declaration in the paragraph following which contains the following words, "And that to the extent that the Atlantic Coast Line Railroad Company has so charged, de-
[fol. 1457] manded, collected and received rates for such transportation of such logs in excess of the said Cummer

Scale. It has overcharged the shippers and/or consignees of such logs", continuing to the end of the paragraph. We object to so much of the next paragraph as recites that: "a great number of said overcharges has been charged, demanded, collected and received by the said Atlantic Coast Line Railroad Company". We also object to part of the order (these things I have referred to are in the preamble) on page 4, paragraph 1, which recites substantially that, "That the lawful rates for the transportation of logs, carloads, except cedar logs and except ash, gum, hickory, oak, pine and cypress logs not over six feet in length for distances up to but not exce-ding 170 miles now in force and effect under the laws of the State of Florida, and on and at all times since February 7, 1929, as well as prior thereto, in force and effect under the Laws of the State of Florida, is the distance scale of commodity rates described in said opinion of the Supreme Court of the United States as the Cummer Scale." We object to the statement in the same paragraph, which after the statement of the Cummer Scale continues the following: "and no other rates for the intrastate transportation for such logs and carloads for such distances between Atlantic Coast Line Railroad stations in Florida, now is or at any time since February 7th, 1929, has been lawful." The grounds of objection are that the preamble and statements are argumentative. That they undertake to judicially conclude some of the questions which are at issue and that those statements and conclusions are contrary to the Commission and what we contend to be the facts. As I understand it, we can note those objections and [fol. 1458] the Court will receive the evidence and subject to the objections, pass on the admissibility then.

Mr. Adair: I take it that Mr. Alston, among other things, is going to try to prove the reasonableness of this rate, or the unreasonableness, as the case may be of this lawfully made State rate, and we are going to vigorously and vociferously in regard to that kind of thing object to it. In so far as any documents or matters of that kind are concerned, where the question is close. I think it proper for the Master to receive it for what it is worth and to examine and make his ruling at some other time, or at this time, as the Master may see fit. This procedure, as I see it, is necessarily under the control of the Master, and he has the right and it is his duty to determine the admissibility of the evi-

dence as it comes along. He may admit it and give it such weight as he thinks it ought to have, or he may reserve his ruling on it and then when he makes his report, may rule upon it, but I don't want to be understood that either party to this proceeding can bring in any immaterial matter and Your Honor will be required to take it down and let the Court consider it later. Upon this point, the point of the admissibility of this order, it seems to me that there can be no question but that the whole order is admissible for whatever weight Your Honor may give it.

Court: Do I understand that your objections are to the order or just the preamble?

Mr. Alston: To practically all the preamble and some statements in the order itself, which in effect are stated, but the final order I have not any objections to.

[fol. 1459] Court: The reason I asked the question was this. You designated certain portions of the preamble and certain portions of the order that you object to and then you stated the grounds of your objections and I was a little confused whether you stated your grounds were applicable to only the preamble or the order itself.

Mr. Alston: They are applicable to each part, each objection made.

Court: Is there anything further?

Mr. Adair: Your Honor, we have nothing further to offer at this time. Our observation is, that completes the record. We have the order of the Court that this rate was maintained under the authority of the State of Florida. We have this special rule No. 1, or No. 16, which I understood was there before the Supreme Court of the United States in the supplement by and which declares or adopts this order and makes it a part of the State made rates and declares that no changes shall be made in the rate without the consent of the Florida Railroad Commission. We have the Florida Statute which in turn states that the Florida Railroad Commission shall not change the state made rate without notice and a hearing upon it. The document showed there was no notice and there has been no application for change and no notice and no hearing for any change in the Florida State rate, and as we say, under the order of this Court appointing Your Honor Special Master, directing Your Honor to find the amount to which we are entitled to be refunded measured by the difference between the rate

charged under the unlawful order of the Interstate Commerce Commission and what would have been charged under the established, which means, the one established lawful State rate we have shown here. The established [fol. 1460] state rate during all that time was the Cummer Scale of rates and that the only reason the Florida Commission permitted that rate to be changed except as a lawfully established state rate was because of the compelling force of Federal Control exercised adversely by the Interstate Commerce Commission and by virtue of the failure of the Court in the first instance to enter the order which the Supreme Court of the United States says should have been entered in the first instance and the measure of benefits that have been enjoyed by the (P. 15 of testimony) Atlantic Coast Line Railroad, by that order, and the failure of the Court to do that in the first instance.

Mr. Norman: Before we go into this, there is no answer filed by you in the Wilson Lumber Company's claim. I assume it was an oversight and ask you to file it later.

Mr. Alston: May it please the Court, I would like to state my conception of what we are trying. The chart in this case, so far as Your Honor is concerned is, of course, the order. Part of that order is as follows: "It is ordered that Horace M. Holden, Esquire, William Oliver Building, Atlanta, Georgia, be and is hereby, appointed as Special Master to ascertain and report to this Court, the sums severally due to the complainants, or other persons represented by the Florida Railroad Commission in this suit, by the Atlantic Coast Line Railroad Company as overcharge exacted between said dates by virtue of the invalid [fol. 1461] order of the said Interstate *State* Commerce Commission, as measured by the difference between the amount collected and the established lawful rate in force at the time each shipment was made, as the Master may have found it to have been. The Master shall require specific claims to be filed by each claimant and proof of each item unless agreed upon, and shall report all items with dates thereof, distinguishing those arising, on shipments from points North of Jacksonville, Gainesville, Burnette's Lake and High Springs, from those arising South thereof and those of dates prior to April 29th, 1929, when the Florida Railroad Commission is alleged to have altered its State rates and classifying the findings otherwise, as he

may find necessary or convenient. The Master is further authorized to make and report such findings of law as may be proper in the premises and to make records as to the amount and incidents of costs and expenses of this hearing and of this case. He may employ a stenographer for the hearings and preparation of his report and in his discretion may take evidence at points without the district and without the State of Georgia. Itemized claims for restitution are to be filed before him by the several claimants not later than September 1st, 1931, and he shall file his report not later than November 1st, 1931, unless further time be given by the Court."

Now, that is the chart for you and for us as I understand this present situation. Now, Your Honor, the order of the Interstate Commerce Commission dated August 2nd, 1928, is in the pleadings of these cases and I take it they are before the Court, and if they are not before the Court, we ask to have it understood that those papers, as plead, are offered in evidence by us.

[fol. 1462] Mr. Adair: I think that everything that was before the Court in the main proceeding is before the Master and think we may as well understand that. We don't ask that those things be technically offered here.

Court: You made a very general statement that everything was before the Court. It might be well to specify what was or was not, there are so many things here.

Mr. Alston: In the pleadings, I suppose that is going to mean the pleadings on the original bills.

Mr. Adair: As I see it now, what we are trying to get at is a matter of law.

Court: Of course the pleadings are before me but I am speaking of things other than the pleadings. You have orders from the Florida Commission and orders from the Interstate Commerce Commission too.

Mr. Alston: The order of the Interstate Commerce Commission is the order just referred to and that is set out in the opinion of that case and the orders are set out as exhibits to the pleadings in this case and I want that report and that order to be considered as evidence.

Mr. Adair: May I make this statement? Our view of this case and I don't think there can be any dispute about it, is that this proceeding is entirely a supplement to and part of the main proceeding and therefore, I think everything

in the main case is before Your Honor. Now, we might do this, I think probably we should call to Your Honor's attention, those things we want you to consider so that you may particularly consider those things.

[fol. 1463] Court: In a sense it is a supplement to and a continuation of it but in another sense it is a denovo matter after the decision of the Supreme Court and for that reason I wouldn't want any doubt as to what is before me and what is proper evidence. The mere fact that it was plead would not put it before me as evidence. I suggest to you gentlemen that in order to clear this up to definitely put before me what is evidence and not as pleadings as of course, the pleadings are before me but the evidence as plead is not before me unless you consider this a continuation of the trial that was before the Court before.

Mr. Adair: That is what the Supreme Court of the United States has said is the effect of this, that it is a continuation of the main case.

Mr. Norman: Couldn't we stipulate that all these documents that have been filed and exhibited in the pleadings are considered as in evidence.

Mr. Alston: It may be necessary for us to make a list of these papers.

Court: All right, but keep in mind the difference between pleadings and evidence and specify here what you introduce as evidence.

Mr. Alston: As I understand, the report of the Commission and the orders which are in the record have been tendered as evidence before the Master.

Mr. Adair: Yes, they are.

Mr. Alson: Then the next think offered is the Florida Commission order No. 979, effective January 30th, 1929, and issued same date, which I will read to the Court and offer in evidence.

[fol. 1464] Introduced as Alston's Exhibit No. 2.

I will state that the claimants have three bills in this District to enjoin the enforcement of that order and the Court rendered an opinion in which it is stated in substance that the order should be construed as affecting a certain part of the State of Florida, I mean as to shipments having their origin in a certain part of the State of Florida, which, I think, is called the Northern part, and it then, without

any more discussion, dismissed that bill and it returned nothing but that opinion and left the bills completely dismissed. The Florida Commission then, after that was done, entered this order No. 990 that I am reading, which is under date of April 20th, 1929, and reads as follows:

(Reads order 990, which was introduced as Alston's Exhibit No. 3.)

Mr. Adair: I have no objection to the admission of that paper in evidence but I do object, of course, to the construction placed upon it by Mr. Alston. Our view of it is that it is merely the bowing by an obedient State to the power of Federal authority, wrongfully exercised, and that it could and will have no affect on this trial.

Court: You will plead duress, so to speak?

Mr. Adair: Yes.

Mr. Alston: We will offer No. 990. Now, we believe that remained in force and effect until order No. 1032 came in, which was entered on March 5, 1931, after the decision of the Supreme Court.

Marked Alston's Exhibit No. 4. Same as Adair's (page 20 of testimony) Exhibit No. 5.

[fol. 1465] Mr. Adair: We have no objection to the statement being received. We state that since the days of secessation are gone, an obedient state has decided to obey the overwhelming force of Federal power until that erroneous exercise of Federal power shall be reversed. We think though we have stated the plain meaning of the Statute as taken by its four corner; also, we say that the Florida Commission has no power to alter a lawful state rate even if it intended to do so, which it didn't, without notice to the interested parties and a hearing was had.

Mr. Alston: We next offer petition in United States Circuit Court of Appeals, Fifth Circuit, in case of Atlantic Coast Line Railroad Company, Appellant vs. Mamie G. Eaton, et al., appellees, No. 5541, in equity. And this is not a certified copy, but have you any objection to its going in?

Mr. Adair: We have no objection.

Introduced as Alston's Exhibit No. 5.

Mr. Alston: This shows the basis, the effect of the order. Now, this has an exhibit attached to it, of the proceedings

in the Interstate Commerce Commission matter. The petition, order, report, etc.

Mr. Adair: We make no objection because it is not certified. We have no objection to the Court receiving it but we do object to it being received for the purpose of forming a basis of this restitution which we think we are so justly entitled to. Even if we take it all that was settled by this Court on Motion for Restitution and his response thereto, all of that being set up in his response and not in the scope of the record.

Court: What I wanted to know was whether or not it was intended to introduce as evidence this record in the Florida case too, as well as the record in the Circuit Court of Appeals.

[fol. 1466] Mr. Alston: This necessarily would be.

Mr. Adair: Yes, sir, I think so.

Court: Unless it is understood that the record in the other Court was being treated as being in evidence too, I just wanted to know what was before me.

Mr. Adair: I think they are indivisible.

Mr. Alston: I think so. We next offer in evidence the petition of the Atlantic Coast Line Railroad Company to the Circuit Court of Appeals on motion to dissolve temporary restraining order No. 5541. I will read it to Your Honor. The Florida Commission moved to dissolve that order in March 1931.

Mr. Adair: That last paper that was offered, we have no objection to the paper being received in evidence but we object to it, however, as being received or considered for the purpose of interferring in any wise with our restitution, to which we consider ourselves justly entitled.

Received as Alston's Exhibit No. 6.

Mr. Alston: We next offer in evidence the motion of the Florida Railroad Commission in this case No. 5541, to dissolve the temporary restraining order.

Mr. Adair: It is immaterial and irrelevant and we object to it being received as far as having any effect on our right of restitution is concerned.

Received as Alston's Exhibit No. 7.

Mr. Alston: We next offer in evidence order dissolving [fol. 1467] temporary restraining order in the United

States Circuit Court of Appeals case No. 5541, as taken from the minutes of March 30th, 1931.

Mr. Adair: We have the same objection to this paper as given to the others.

Received as Alston's Exhibit No. 8.

Mr. Alston: We next offer motion for leave to file petition for writ of mandamus and petition for writ of mandamus in the Supreme Court of the United States, October term, 1928, No. 19. Petition for writ of mandamus to be issued to the Hon. William B. Sheppard, Judge of the United States District Court for the Northern District of Florida, and to the said Court, I won't read it now as it is of some length. The Court dismissed our bill without calling together the three judges as we claim it should have done. We then filed our petition of mandamus. The Court allowed us to file it and after that, indicated that he would grant our petition and stated that no writ would issue, upon the supposition that the respondent Judge Sheppard, would comply, which he did do. This paper was filed and sworn to on the 21st of March 1929. The petition for mandamus was sworn to on the 21st day of March 1929. That is part of the same report. Judge Sheppard's response was filed April 22nd. He filed an amended return to his rule on April 27th, in which he set up order No. 990, which was from the Florida Commission, and claimed that that order, that the sustaining of those rates made the question moot. The exact statement will be shown in the paper themselves that was certified to on the date it was issued, April 20th, 1929. We offer these two papers.

Received as Alston's Exhibits Nos. 9 and 10.

The return of the respondent, William B. Sheppard, Judge of the District Court of the United States for the [fol. 1468] Northern District of Florida, to the rule to show cause, Supreme Court of the United States, October Term, 1928, No. 19, ex parte, Atlantic Coast Line Railroad Company, Petitioner.

Received as Alston's Exhibit No. 11.

Reply of the Atlantic Coast Line Railroad Company to return of respondent in the Supreme Court of the United States, No. 19, October term, 1928, received as Alston's Exhibit No. 12.

Mr. Alston: You will find a petition here for reopening the case and marking the findings on it necessary to complete the record, and the Supreme Court held as we contend, that they should not; that the record before you shows that it was reopened and I now offer in evidence the tentative report or proposed report filed by the two examiners. I might state this, that after this case was reopened it was referred to an examiner to take evidence, to an examiner or examiners to take evidence and to propose to the commission a report. The examiners had two hearings for taking evidence lasting for three or four days, three days I think in Jacksonville and some other day subsequently in Washington. Those hearings were had before Examiner Hoy and Examiner Peyser, and the second hearing I don't know whether Examiner Peyser sat or not.

Mr. Adair: No, sir.

Mr. Alston: Objections to their report have been filed as to the unreasonableness of those rates which were in effect what they were to find and to indicate that they discriminated against Interstate commerce. They have found they didn't discriminate against persons and localities in interstate commerce. Our brethren have filed objections and the matter is set for February 3rd. We now offer that record in evidence. I mean the Examiners' report.

[fol. 1469] Mr. Adair: We object on the ground it is irrelevant and immaterial and the Interstate Commission has no right to fix retroactive state rates. The Supreme Court of the United States in this very case has said that the fixing of the state rates is for the State authorities and not the Interstate Commerce Commission. In addition to that, the report did not purport to be final but is a mere recommendation to the Interstate Commerce Commission. On the further ground also, that the reasonableness or unreasonableness of those (p. 25 of testimony) rates is not in issue before Your Honor. That is a matter which is not within the scope of the reference. Your Honor was required to determine how much restitution we were entitled to measured by what was charged under color of this unlawful and illegal order of the Interstate Commerce Commission and the lawful established State rate. And whatever the Interstate Commerce Commission or two of the district examiners may think about this rate with respect to the future can have no force or effect as to what was the established lawful state

rate at the time these respective shipments were made. Not only is it perfectly plain from the Federal statutes, all of which are well known to Your Honor, that the Interstate Commerce Commission has no power to make the retroactive order, but as I understand this particular report does not intend to do anything except to recommend to the commission rates which should be charged in the future.

Court: It is one o'clock. We will take a recess until two p. m.

Hearing reconvened at two p. m.

Mr. Alston: Your Honor, I have decided to yield to the objections made by Mr. Adair and his associates to this pro- [fol. 1470] posed report filed by the examiners and I will withdraw the same.

Mr. J. W. Perrin, sworn by the defendant, testified as follows:

Direct examination.

By Mr. Alston:

My name is J. W. Perrin. I live at Wilmington, N. C., and I am freight traffic manager for the Atlantic Coast Line Railroad Company. The Florida Commission in their order No. 979, stated that the Atlantic Coast Line Railroad had filed with the Interstate Commerce Commission in the following schedules, to become effective on January 8, 1929: Agent Glenn's Southern Lumber Tariff I. C. C. A-659, supplement 10, 12, 13, 15 and 16; Agent Glenn's Port Lumber Tariff I. C. C. A-647, supplement 8, 9, 11, 13 and 14; Atlantic Coast Line Railroad Company's Florida Local Tariff No. 20, I. C. C. B-2466, supplement 4, 5, 6 and 7. These tariffs were filed with the Railroad Commission of Florida. I have the exact record of the supplements 4 to 7 inclusive to the Florida Local Tariff No. 20, I. C. C. B-2466, but I cannot give you the exact dates. I will state that the tariffs were forwarded to the Florida Commission and we have the receipts for them. I have those tariffs here which are now in use by Mr. Turnbull for the commission.

Q. Please state if the purpose of those tariffs filed with the Florida Commission, the rates which have been fixed by the Interstate Commerce Commission to be used intrastate in Florida, are the tariffs of the Atlantic Coast Line Railroad Company for the transportation of logs?

Objection. (Argument on objection.)

Witness: The purpose of filing the tariffs with the Florida Commission will be illustrated by the use of supplement 7 of [fol. 1471] the Florida Local Tariff No. 20, which contains on page 2, the scale of mileage rates on logs except Walnut, Cherry and cedar, carload minimum weigth fifty thousand pounds, so much per hundred pounds. On the following page it is specifically provided that the tariff applies on traffic moving wholly within the State of Florida and not passing over another state in transit. The rates which are shown at the place indicated on page 2 are the rates fixed by the Interstate Commerce Commission and not the Cummer Scale of rates. This bears notation issued November 7, 1928, effective January 16, 1929. That date was abandoned in accordance with an order of the Interstate Commerce Commission. That order was subsequently moved up to February 8th, 1929, after this supplement was issued. The reason why it became necessary to issue supplements subsequent to No. 4, which was issued to become effective on October 10, 1928, and which was the first supplement containing the rates prescribed by the Interstate Commerce Commission, is that after the original order of the Interstate Commerce Commission was issued, they, on several occasions postponed the date beyond the date originally fixed on which the rates were to become effective.

Mr. Adair:

Q. You were testifying, I believe, with reference to supplement dated November 7, 1928, were you not?

A. I mentioned supplement No. 4.

Q. I beg your pardon. That is the one I now hand you.

A. Yes. There is a footnote in that supplement explaining and relating to the table of commodity rates on logs which are set forth in that supplement. The footnote is provided for by a character shown as a part of the prescribed rate for the logs and referred to a note there set [fol. 1472] forth, "Additional increase issued in compliance

with the order of the Interstate Commerce Commission in I. C. C. docket 18364, dated August 2, 1928." That footnote explains the reason of the change in the rate.

Q. Mr. Perrin, those tariffs were filed pursuant to the order of the Interstate Commerce Commission were they not?

A. You mean the rates were issued in accordance with that order?

Q. Yes.

A. Yes. They were filed under the Florida Commission.

Q. The Florida Commission acquiescenced in the increase? (P. 30 of testimony.)

A. Specifically.

Q. Yes.

A. No, not that I know of.

By Mr. Alston:

Q. Did they file those tariffs? Did they return those tariffs at all?

A. No, sir.

Q. Those tariffs that you are looking at now have come from the Florida Commission?

A. Yes, sir.

Q. You were asked about supplement 5 which was issued on September 28th, to become effected November 5th, 1928, when interrupted.

A. Supplement 5 makes no change in the rates on logs as they appear in supplement 4. The only purpose for including log rates in supplement 5 was to postpone the effective date until November 5, 1928, in accordance with the action of the Interstate Commerce Commission changing its original order.

Mr. Adair:

Q. That note was carried on all the supplemental tariffs?

A. Yes, the note I testified to a few moments ago, the [fol. 1473] substance of it was the same. The footnote in supplement 5 reads "(a) Increase, page 2, Supplement No. 4, except as noted—effective date is hereby postponed from October 10, 1928 until November 10, 1928." Issued on five days notice under special order of the Interstate Commerce Commission, 89865, of September 21, 1928 and in compliance with the order of the Interstate Commerce Commis-

sion, dated August 2, 1928, No. 18364, as amended August 7, 1928." The other supplements carried forward these same rates throughout with the same notation in substance. However, each one of these supplements could refer to other rates on other commodities as well as to reference to these local rates because they supplement the Atlantic Coast Line Railroad Company's Florida local tariffs that covers practically all of the intrastate traffic of the railroad in Florida.

Mr. Alston:

Q. Mr. Perrin, please present in full sets the exhibits which you offer in this proceeding.

A. I present 23 exhibits, numbers one to 23 inclusive, to be the subject of the testimony that I will give.

Objection. Grounds of objection stated and argument. (P. 32 to 47 of testimony.)

J. W. PERRIN recalled to the stand.

I filed certain supplements showing the tariff establishing the scale prescribed by the Interstate Commerce Commission for traffic within the State of Florida. These supplements remained in effect until after the decision of the Supreme Court. The rates provided by those supplements were superseded by a scale of rates under order of the Florida Commission putting in the Cummer scale. This was about March. The Cummer scale has been in effect and been applied by the Atlantic Coast Line Railroad Company for the movement of logs and intrastate traffic, and it [fol. 1474] is still being applied. The Atlantic Coast Line Railroad Company applied to the Interstate Commerce Commission to have that rate set aside as unjust, unreasonable and confiscatory.

Q. Yes, before the Interstate Commerce Commission you are not applying to have it put aside as unjust, unreasonable and confiscatory, but only as a burden on interstate commerce?

A. That makes it unreasonable. We have not applied to the Florida Commission and are not applying to any Court except in this proceeding in this Court and except to the Interstate Commerce Commission.

By Mr. Alston: The Florida Commission has appeared in person or by counsel in an effort to sustain the Cummer Scale rate. The chairman of the commission appeared before the commission and examiners and stated in substance that the Cummer Scale rates were reasonable, at the first hearing in Jacksonville. That was the second hearing for taking of testimony in the case before the commission. That was in January, 1927.

Q. Please state in all other hearings, the Commission, including the present hearing, if the Commsision has appeared either in person or by counsel and whether its appearance was in person or by counsel in asserting the reasonableness of the Cummer scale rate.

A. Yes, sir.

Objection and argument.

Q. Let me ask you this Mr. Perrin. Isn't it the position of the Florida Commission in Court that the Cummer Scale rate is the reasonable and just rate?

Objection. (P. 50 of testimony.)

[fol. 1475] Q. The Cummer Scale rates were published and all of the tariffs of the Atlantic Coast Line Railroad Company for application in Florida until these supplements became effective about which you testified and identified on yesterday?

A. Yes.

By Mr. Alston: After the publication of these supplements after they became effective, which was on the 8th day of February 1929, the Atlantic Coast Line Railroad Company tariffs did not carry the Cummer Scale rates until 1931. They carried the interstate scale until after the mandate of the Supreme Court had been entered by the United States District Court herein March 1931. Then after that the Atlantic Coast Line Railroad Company published other tariffs carrying the Cummer Scale rates. They addressed communications to the shippers as to their rights. In substance, it was to the effect that the Cummer Scale was being gradually restored but they were not recognized as the lawful rates and upon the conclusion of the question as to what the lawful rates are, that the Atlantic Coast Line Railroad Company would expect to recoupe the

difference in the charges as assessed under the Cummer Scale and the finally settled lawful scale.

A mimeographed circular, No. D-5092, otherwise marked GFO 10653 and issued May 18th, 1931 was exhibited to Mr. Perrin and he stated that this was the letter or circular to which he was referring a few minutes ago.

Mr. Adair:

Q. Mr. Perrin, as a matter of fact you subsequently restored the Cummer Scale to the tariff?

[fol. 1476] A. The Cummer Scale was restored coincidently.

Q. That is the occasion of the supplements?

A. Yes, sir.

By Mr. Norman:

Q. While this circular is dated, as Mr. Alston said, effective May 18, 1931, it recites instructions that were issued to the traffic managers by yourself under date of March 25th, 1931, and it was when these instructions were issued, March 25th, 1931, that the Atlantic Coast Line Railroad Company began to collect the Cummer scale instead of the Interstate Commerce Commission scale?

A. Yes, sir. That circular is a letter of confirmation of all instructions that had been issued in another form and was put in a circular form as a matter of record.

By Mr. Alston: The Cummer scale of rates was effective up to 170 miles and not beyond that. Above 170 miles it is class P rates of the Florida Commission. This has been true during all the time the Cummer Scale has been in force. There has not been a time since Class P rates were established in 1914 that they have not been applied on logs in excess of 170 miles. There is some movement in logs on distances over 170 miles. One car is an appreciable move. The Cummer Scale of rates was originally established for the 170 mile distance. Always has been there. The Cummer scale, as we conceived it was originally for shorter distances but was extended to 170 miles. It was extended from time to time. It was not extended from its original limits at one time. When the Cummer scale was in effect for 170 miles or less, it displaced the Class P rate [fol. 1477] for those distances. The Class P rates had no

application for distances under 170 miles at any time that the Cummer scales for 170 miles were in effect. It is true, however, that a part of the time since the Cummer Scale has been applied it did not extend up to 170 miles. The Cummer scales did not extend, in fact, extended up only to 120 miles and as long as that condition existed the Class P rates applied to all distances over 120 miles. During the period that the rates were established under order of the Interstate Commerce Commission, the interstate scale of rates established by that commission became effective for all distances up to 170 miles. This Cummer Scale was extended to 170 miles quite a while before the proceedings were instituted by the Interstate Commerce Commission. It was applicable up to 170 miles at the time that these proceedings before the commission began, for several years before that.

Thereupon, the circular testified to by the witness was introduced in evidence and marked Alston's Exhibit 13. And here were offered and received Alston's Exhibit No. 14 and 15. (P. 60 of testimony.)

Supplemental answer of the Florida Railroad Commission in the District Court of the United States for the Northern District of Florida was received as Adair's Exhibit No. 8.

The order of the Three Judge Court made at the hearing had upon application of the Atlantic Coast Line Railroad denying the application for introlocutory injunction, was received as Adair's Exhibit No. 9.

[fol. 1478] A certified copy of the record of the rule to show cause as to why an injunction should not be issued was received as Adair's Exhibit No. 10.

The motion made by the Atlantic Coast Line Railroad Company in the Circuit Court of Appeals to dismiss the appeal and the costs in the Circuit Court of Appeals was received as Adair's Exhibit No. 11.

The response made by the Florida Commissioners to this motion was received as Adair's Exhibit No. 12.

The order dismissing the appeal was received as Adair's Exhibit No. 13.

Objection to the last three documents.

Mr. Adair: That is all the evidence we have to offer.

Hearing then adjourned.

Hearing reconvened at Atlanta, Georgia on May 9th, 1932. Present as before.

J. W. Perrin, previously sworn, recalled to the stand for further direct examination.

By Mr. Alston:

Q. Mr. Perrin, in the previous examination you stated your qualifications and your relations with the Atlantic Coast Line Railroad Company in this case. You also stated that you have prepared certain exhibits for the purpose of showing the unreasonableness of the rates which are known in this record as the Cummer Scale rates. I now exhibit to you document headed, "Statement showing in cents per hundred pounds comparison of the so-called Cummer log scale with (1) local rates of lines operating within the [fol. 1479] Southeastern and Mississippi Valley territories, and (2) with net transit log rates operated by certain Mississippi Valley and Southeastern lines." Will you be kind enough to say whether or not that was made up by you or under your directions and explain the exhibit to the Court.

Mr. Adair: Object to the witness testifying from any memorandum with respect to the reasonableness of these rates on the following grounds:

1. The reasonableness or unreasonableness of the Cummer Scale has no part or parcel in this inquiry.

2. There is no rule of law which makes it permissible in a court of equity for exhibits made up by a witness, either as a memorandum or otherwise, to be admissible in evidence.

3. Because the sole inquiry here is what is the extent of the restitution to which we are here entitled and the relation of the Cummer Scale to any other scale of rates upon the same or any other commodities has nothing to do with this matter at all except the difference between the Cummer Scale or unlawful rate prescribed by the Interstate Commerce Commission, which has been condemned and set aside.

Argument on objection. (Pages 69-136 of the testimony.)
The Court reserved its ruling.

Mr. Adair objected to all testimony involving the rate being unreasonable, unjust or confiscatory.

J. W. Perrin, previously sworn, testified as follows:

Direct examination.

By Mr. Alston:

"I have been connected with the Atlantic Coast Line Railroad Company, including the lines that now constitute the organization throughout all my business life and that extends over a period of 41 years, of which the first year was devoted to engineering and the remaining 40 years to the freight and traffic department in connection with [fol. 1480] freight rate adjustments. I have occupied from start to finish positions as Junior Clerk, Rate Clerk, Chief Rate Clerk, Chief Clerk, Assistant General Freight Agent, General Agent, Assistant Freight Traffic Manager and Freight Traffic Manager. I have been serving as Freight Traffic Manager for approximately one and a half years. I served as Assistant Freight Traffic Manager about ten years. Throughout all of the years in which I held these various positions my work has been in connection with freight rates. I have had as much contact with the matter of freight rates on logs as any commodity in which the Atlantic Coast Line Railroad participates in transporting. I have testified in practically all of the log rate cases that have been heard before the Interstate Commerce Commission and before the various state commissions within the last ten or twelve years for the Atlantic Coast Line Railroad. The Atlantic Coast Line Railroad operates in Virginia, North Carolina, South Carolina, Georgia, Florida and Alabama. The tendencies as to log rates throughout that territory on the Atlantic Coast Line Railroad and all other carriers in the territory has been to bring about uniformity, and that tendency has been due to numerous cases before the Interstate Commission, in which the Commission has been consistent in prescribing generally the same level of log rates for the Atlantic Coast Line Railroad and other railroads that are in this immediate neighborhood. The tendency in that territory on logs has been toward uniformity between interstate and intrastate rates. The interstate rates on the Atlantic Coast Line, established by the

[fol. 1481] Interstate Commerce Commission is the same as intrastate rates in Alabama and in Virginia and substantially the same in Georgia and substantially the same in South Carolina. The only substantial difference between the system scale as established by the Interstate Commerce Commission and intrastate rates, as established by state commissions, is within the State of Florida and within the State of North Carolina. In the latter state, rates were submitted to the state commission with the view of securing complete uniformity but under the depressed conditions as they existed at the time of the hearing, the North Carolina Commission has withheld its decision and postponed any action upon that plan of uniformity. I would say that a reasonable rate for freight railroad transportation in and of itself, and without regard to rates on other commodities or without regard to rates on the same commodity in the same situation, depends upon the ability to move the traffic freely at the applicable rate with a fair and reasonable profit for the transportation and offer a proper contribution towards the revenue necessary to maintain the transportation system as a whole."

Q. In ascertaining the reasonableness of a rate, is it customary and usual, as a railroad man and a rate man, for a State Commission and Interstate Commission to make comparisons between rates on the same commodity in the same or like territory and on rates or commodities having similar transportation characteristics?

Objection. Objection noted and ruling reserved.

A. It is correct that the customary means of testing the reasonableness is by such a comparison as you have mentioned. I have made a comparison of the Cummer Scale rates with log rates of lines operating within the Eastern and Mississippi Valley territories and with net transit log [fol. 1482] rates by certain Mississippi Valley and Southeastern lines. (P. 140 of testimony.) Logs are one commodity that move almost universally within the Southern territory. There is no railroad in the South that does not engage in the transportation of logs. The Atlantic Coast Line Railroad from one end of its line to the other is a log carrying railroad. In the same manner as is the case of the Louisville & Nashville; the Seaboard Air Line Railroad, the Southern Railroad, the Central of Georgia, the St.

Louis & San Francisco, the Chattanooga and St. Louis Railroad and Illinois Central and the Gulf, Mobile and Northern Railroad and Mobile and Ohio Railroad. In rate making, the Interstate Commerce Commission has established a division of the State of Florida in two parts, one part being North of the Seaboard Air Line Railroad from Jacksonville to River Junction and the other part of Florida being South of that line. The Interstate Commerce Commission has prescribed almost uniform differential rates based upon territories South of the Seaboard Air Line Railroad in Florida to be added to the common level rates in the Southern territory as a whole. As to merchandise traffic, which is covered by class rates as distinguished from special commodity rates; that difference is 15% of the scale of rates for the district within the State of Florida. Likewise, as to commodity rates, with the exception of fertilizer and possibly one other commodity which I don't recall, a differential is also applied within the State of Florida for the territories within the State of Florida over and above the level of the rates commonly applicable throughout the South. That has been done by the Interstate Commerce Commission in recognition of the geographical situation in Florida coupled with the low percentage of traffic in the peninsular of Florida. The absence of any very high traffic through the State of Florida and [fol. 1483] the recognition of the fact that the small per mile rates within the State of Florida as applicable elsewhere in the South, would not produce the proper share of revenue to support the transportation system. The territory throughout the Southeast is substantially similar and homogeneous as to the transportation of logs but within the State of Florida there is not the same density of traffic.

Q. Well, you have made the comparison with the Cummer Scale rates with respect to logs and the territory mentioned and please state the result of that comparison. You have handed to the Court, counsel and stenographer, an exhibit purporting to deal with the question which I have just asked you. Please state in a summary way, the effect of that exhibit.

Objection.

A. This exhibit is explained in its caption and it is a comparison by itself between the rates per one hundred

pounds under the Cummer log scale in Florida and the scale of log rates between principal railroads operating in the Mississippi Valley territory and of the principal railroads operating in the Southeastern territory. The distances are shown in the first column here in mileage blocks up to 170 miles, which is the maximum distance for which the Cummer scales apply.

Objection. This paper offered as Perrin Exhibit No. 1. Objection. Argument on objection. (P. 144-151 of testimony.)

The log rates under the Cummer scales are tremendously lower than the rates of the Southeastern territory as a whole.

Objection.

[fol. 1484] The rate under the Cummer scale of rates for a distance of 50 miles is 40% lower than the net transit rate of the St. Louis-San Francisco and the Gulf, Mobile & Northern Railroad, which is the lowest net transit rate of all of the lines in the Mississippi Valley territory. Extending the comparison between the Cummer Scale and other rates for the 50 miles distance, it will be noted that in the scale of the Atlantic Coast Line applicable in all interstate situations and in several of the intrastate situations other than in Florida, also of the Southern Railroad and Seaboard Airline Railroad, the rate is four and a half cents per one hundred pounds as compared with 2.1 cents per one hundred pounds under the Cummer Scale. The rate of the Carolina, Clinchfield and Ohio Railroad is four cents per one hundred pounds for fifty miles and of the Nashville, Chattanooga & St. Louis Railroad five cents per one hundred pounds, as contrasted with 2.1 cents under the Cummer Scale. The Cummer scale is 53% less than the net transit rate of the Louisville & Nashville Railroad. The net transit rates mean that on the Atlantic Coast Line, the Southern Railway, the Seaboard Air Line and all lines in strictly the Southeastern territory with the exception of the Louisville & Nashville Railroad, the rates on logs covering movement to sawmills and also to the movement were not for manufacturing purposes, or in other words, the log rates are made on a transit rate because in our territory 95% of the logs that we handle are for sawmills, and consequently

[fol. 1485] the log rates are made on a transit basis. In the case of the Louisville & Nashville Railroad, the Illinois Central, the Mobile & Ohio, the Gulf, Mobile & Northern Railroad, there are local rates as well as net transit rates, local rates applying initially into the sawmill and when the product is re-shipped the charges into the sawmill are cut back to the basis of the net transit rate. Now, the net transit rates of the lines operating under that system are almost the same and in some cases slightly higher than the log rates in the Southeast, including the Southern Railway and Seaboard Airline Railway. Consequently, the comparison of the log rates of the Atlantic Coast Line with the lines operating the transit rate shows an enormous difference. The rates on the Atlantic Coast Line on the Cummer Scale being enormously lower than the lines operating the transit rate and the Cummer rate itself is very greatly lower than the net transit rate of any line operating that system. My answer runs entirely to the rates that are being used and have for years been used on these several railroads.

Q. Now, take one hundred miles for instance. What is the comparison between the Cummer Scale of rates and the St. Louis and San Francisco net transit rates?

Objection.

A. For one hundred miles the rate under the Cummer scale is 2.6 cents per one hundred pounds and for the same distance under the net transit scale of the St. Louis & San Francisco, the rate is five cents per one hundred pounds.

[fol. 1486] Q. How did it vary with the log rate of the Illinois Central?

Objection.

A. The log rate is eleven cents per one hundred pounds while the net transit is 6½ cents. On the Mobile & Ohio Railroad the local rate is ten and a half cents and the net transit rate is six and a half cents per one hundred pounds; the Gulf, Mobile & Northern Railroad is eleven cents per one hundred pounds for the local rate and they carry transit or reshipping rates which is the same as the net transit as far as applicability is concerned but they carry their scale of reshipping rates only up to seventy miles. The log

rate of the Atlantic Coast Line for interstate application and with the exception of the Florida and North Carolina intrastate, it is 2.6 under the Cummer scale, the rate of the Southern Railway is six cents per one hundred miles as compared with 2.6 cents under the Cummer scale. The Carolina, Clinchfield and Ohio railway for 100 miles is 5.6 cents per one hundred miles as compared with 2.6 cents under the Cummer scale; the Nashville, Chattanooga & St. Louis Railroad is seven cents per one hundred miles against 2.6 cents under the Cummer scale. The local rate of the Louisville & Nashville Railroad is eleven and a half cents per one hundred miles and the net transit rate for the Louisville & Nashville Railroad is six cents per one hundred miles as compared with 2.6 cents under the Cummer scale. The Seaboard Air Line Railroad has the same log rate as the Southern Railway and Atlantic Coast Line, six cents per one hundred miles.

Q. Which rate is more nearly comparable to the Cummer Scale, the local rate or net transit rate?

[fol. 1487] A. The net transit rate, that is, by comparable, you mean approaching the level of it?

Q. No, I mean which is more applicable to it as a transportation matter?

A. The local and the net transit is the same on the Atlantic Coast Line Railroad or the Seaboard Airline and on the Southern Railroad. These three railroads are operating for the most part in the Southeastern territory. The Florida East Coast hauls logs in a great amount but I have no comparison with them. Their rates would run very much higher than the Cummer scale. They would be more nearly comparable to the Atlantic Coast Line Interstate scale which is almost the same as the Florida Commission applied to the Seaboard in Florida. (P. 155 of testimony.)

I based those comparisons upon rates within my knowledge as being applied by those roads and were applied during the periods since February 9, 1929.

Objection.

Those were the only rates published by those lines for a general application on logs and they are the rates which were applied by those roads.

Q. Have you undertaken to make a comparison of rates of the Cummer log scale of rates with the rates prescribed by the States of Virginia, North Carolina, South Carolina, Georgia and Alabama, together with the percentage of the several states scales with the Cummer scale of rate?

A. I have.

[fol. 1488] Q. In this exhibit which is now before you, you refer to rates prescribed by state commission. I want you to answer this question on the basis of rates which are applied intrastate by the commissions of these states to the Railroads operating there.

Objection.

Q. Mr. Perrin, please state whether or not you have knowledge of what these railroads in these several states around this territory are charging on this transportation.

A. This does not necessarily involve what other railroads are charging. I have knowledge of the rates that the Atlantic Coast Line Railroad is charging in each of these states and that the rates charged by the Atlantic Coast Line are the rates prescribed for the Atlantic Coast Line by the Railroad Commission in each of these states. I do not have any consultation or any communication with the other roads as to what they are charging in these states. I know from their tariffs what rates are in effect, that is, what are the published rates and I presume the published rates are collected. The rate under the Cummer scale is ten miles for 1.71 cents per hundred pounds and the rate charged for ten miles in the State of Virginia is 2.5 cents per one hundred pounds, making the rate in Virginia 146% of the rate in the Cummer scale. At fifty miles the rate under the Cummer scale would be 2.1 cents per one hundred pounds and the rate charged in the State of Virginia is 4.5 cents per one hundred pounds, which is 214% of the rate under the Cummer scale. That ratio continues to hold in the several distances in the Virginia transportation for seventy-two miles, which is the maximum distance [fol. 1489] for the Atlantic Coast Line in Virginia. The rate in Virginia is 5.5 cents as against 2.3 cents under the Cummer scale, the rate in Virginia being 239% of the Cummer scale rate. Between the difference of fifty miles the rate under the Cummer scale is 2.1 cents and under the North Carolina scale as charged in North Carolina is

3.25 cents per one hundred pounds or 155% of the rate under the Cummer scale; for a distance of 160 miles the North Carolina Scale as charged in that state is 210% of the Cummer scale. In other words, 3.4 under the Cummer scale, 7.13 by the North Carolina rate. There are no point to point rates applicable to logs in North Carolina. I don't know of any. In South Carolina for fifty miles the rate under the Cummer scale is 2.1 cents per one hundred pounds while the rate applicable in (page 160 of testimony) South Carolina is 3.5 cents per one hundred pounds being 167% of the Cummer scale. If you take in that distance of a hundred miles the rate under the Cummer scale is 2.6 cents per one hundred pounds and the rate applicable in South Carolina is 5 cents which is 192% of the rate under the Cummer scale. For 170 miles the rate under the Cummer scale is 3.7 cents per one hundred pounds and the rate applicable in South Carolina is eight cents per one hundred pounds, being 216% of the rate under the Cummer scale. In Georgia for fifty miles the Cummer scale is 2.1 cents [fol. 1490] per one hundred pounds and the rate in Georgia is 5.91 cents per one hundred pounds or 218% of the Cummer scale. For seventy-five miles the rate under the Cummer scale is 2.3 cents per one hundred pounds; in Georgia, 7.29, or 317% of the rate under the Cummer scale. For one hundred miles the rate under the Cummer scale is 2.6 cents per one hundred pounds and under the Georgia scale it is 8.96 cents per one hundred pounds or 345% of the rate under the Cummer scale. For 170 miles the Cummer scale it is 3.7 cents per one hundred pounds and under the Georgia scale 10.83 cents per one hundred pounds or 293% of the rate under the Cummer scale. For a distance of fifty miles the rate under the Cummer scale is 2.1 cents per 100 pounds and under the Alabama scales it is 4.5 cents per one hundred pounds or 214% of the rate under the Cummer scale. For seventy-five miles the Cummer scale is 2.3 cents per one hundred pounds and under the Alabama scale it is 5.5 cents per one hundred pounds or 239% of the Cummer scale. For one hundred miles the rate under the Cummer scale is 2.6 cents per one hundred pounds and under the Alabama scale six cents per one hundred pounds or 231% of the rate under the Cummer scale. For one hundred seventy miles the rate under the Cummer scale is 3.7 cents per one hundred pounds and under the Alabama

scale eight cents per one hundred ponds or 216% of the rate under the Cummer scale.

Exhibit just testified about marked Perrin Exhibit No. 2.

[fol. 1491] Q. Now, have you prepared an exhibit showing the comparison of rates on logs prescribed by the Florida Railroad Commission for application on the Atlantic Coast Line Railroad, Class P, per car, of 30,000 pounds excess in proportion, with rates under the Cummer scale showing also percentage that the Class P rates are of rates in the Cummer scale?

A. I have.

Q. Will you please state what these comparisons show, referring to exhibit marked Perrin exhibit No. 3.

Objection and argument.

Q. Mr. Perrin, we are dealing with Exhibit 3, the heading of which I have read to you, will you please state the relation between the class P rate in Florida and the Cummer scale of rates and give some explanation of what the class P scale is.

A. The Class P rates in Florida are the rates prescribed by the Florida Commission and applying on logs on the Atlantic Coast Line Railroad. That rate states in dollars and cents, a car of 30,000 pounds excess in proportion and for the purpose of this comparison have been converted to cents per one hundred pounds, it simply means the rates under the Cummer scale have been converted to a basis of cents per one hundred pounds. The scale prescribed by the Florida Commission for fifty miles is thirteen dollars per car of 30,000 pounds, or 4.33 cents per one hundred pounds. The rate for the same distance under the Cummer scale is 2.1 cents per one hundred pounds, the rate prescribed being 206% of the rate under the Cummer scale. As to one hundred miles the rate prescribed is six cents per one hundred pounds and under the Cummer scale is 2.6 cents per [fol. 1492] one hundred pounds, the prescribed rate being 230% of the rate under the Cummer scale. For 170 miles the rate prescribed is 8.33 cents for one hundred pounds and under the Cummer scale is 3.7 cents per one hundred pounds, the prescribed rate being 225% of the rate under the Cummer scale.

Exhibit 3 and exhibit 2 offered in evidence and objected to. (P. 165 of testimony.)

Q. Have you made a comparison of rates on sawmill logs prescribed by the Florida Railroad Commission for application on the Seaboard Airline Railway, with rates under the Cummer scale, showing also the percentage that the rates prescribed for the Seaboard Air Line are of the rates in the Cummer scale?

A. I have. The rates prescribed by the Florida Commission in its order No. 536, dated December 16th, 1916, to apply on logs of the Seaboard Air Line Railway in Florida for a distance of fifty miles is 3.94 cents per one hundred pounds, as compared with 2.1 cents per one hundred pounds under the Cummer Scale, being 188% of the rate under the Cummer scale. For seventy-five miles the rate prescribed by the Florida Commission is 5.06 per one hundred pounds as compared with 2.3 cents per one hundred pounds under the Cummer scale, or 220% of the rate under the Cummer scale. For one hundred fifty miles the rate prescribed by the Florida Commission for the Seaboard Air Line Railway is 7.31 cents per one hundred pounds, while under the Cummer scale it is 3.40 cents per one hundred pounds, the prescribed rate being 215% of the rate under the Cummer scale. The Seaboard Air Line Railway operates approximately 2,000 miles in the State of Florida. The Atlantic Coast Line operates something more than 2,000 miles in Florida. I am not sure about an estimate of the Seaboard [fol. 1493] Air Line mileage. The territory through which these roads run is comparable one to the other. Often they run by the side of each other for many miles.

Perrin exhibit No. 4 offered in evidence. Objection.

Q. Have you prepared a statement comparing the Atlantic Coast Line Railroad per car revenue on logs interstate and in Florida intrastate, with per car revenue on other commodities moving intrastate in Florida?

A. I have. I have prepared a statement showing first, the rates per one hundred pounds interstate and on logs intrastate in Florida on the Atlantic Coast Line Railroad and on common brick, limestone, sand, lime and cement, intrastate in Florida on the Atlantic Coast Line Railroad. I have extended this statement to showing the earnings for a car of logs as well as on the other commodities. The statements show the information as to rates and the earnings for distances up to three hundred miles. These are the rates not

only charged but prescribed within the State of Florida to apply on the Atlantic Coast Line Railroad Company. They are the rates actually used by the Atlantic Coast Line Railroad Company as to these commodities for distances of fifty miles. The rate for interstate movement of logs is 4.5 cents and for intrastate movement under the Cummer scale it is 2.1 cents per one hundred pounds for the same distance. For the same distance the rate on common brick is six cents, on limestone 4.5 cents, on sand 4.17 cents, on lime nine cents and on cement nine cents per one hundred pounds. The average weight per car for the Atlantic Coast Line Railroad in the handling of logs, and for the year 1925 was 55,000 pounds [fol. 1494] per car. For brick 66,580 pounds; for limestone 92,540 pounds; for sand 92,540 pounds and for lime 50,000 pounds and for cement 70,740 pounds. Based upon those average loadings per car, the earnings for fifty miles on logs is $24.75 per car, interstate, intrastate on logs $11.55 per car, intrastate on brick in Florida $39.95, on limestone $41.64; on sand $38.59, on lime, $45.00, and on cement $63.67. If a car of logs had moved for fifty miles from Florida to Georgia the earnings would have been $24.75 and if it had moved the same distance under the Cummer scale in the State of Florida the earnings would have been $11.55, or less than half.

Motion to strike this evidence on the ground that there is no movement from Florida to Georgia in the present case.

Under the Cummer scale on logs the rate would be $11.55 and on brick $39.95. Under the Cummer scale on logs it would be $11.55 and on sand $38.59 and on lime it is $45.00; on cement it is $63.67, while the Cummer scale on logs is $11.55. The comparison between logs and common brick, limestone, sand, lime and cement is that they all represent the lowest character of traffic from a transportation standpoint, they all being relatively low in value and all loaded heavily per car. Sand is of no value except that brought about by its transportation in ninety-nine cases out of a hundred. The earnings on logs is only half of that on sand. The Florida rate is 2.1. This is true as the rate and as to the earnings. Fifty miles runs through all the mileages.

Q. What is the relationship between the interstate transportation into and from Florida to Georgia and from

Georgia to Florida with the transportation intrastate in Florida?

[fol. 1495] A. What do you mean by the relationship?

Q. I mean, are there similar circumstances and conditions?

A. Well, the transportation is the same, so far as physical transportation is concerned. (P. 170 of testimony.) As to the characteristic of the territory, the land through which it moves you can hardly tell whether you are in Florida or in Georgia. There is no difference in my opinion as a rate expert justifying the difference in the charge in the interstate and intrastate transportation. I have previously stated, under recognized principles of rate making, that rates for Florida are proportionately somewhat higher than rates in Georgia, especially that line between the Seaboard Air Line Railroad from Jacksonville to River Junction. The interstate rates just referred to are the ones now in use by the Atlantic Coast Line which have been in use from about February 8, 1929 and there has been no change in them since that date.

Exhibits offered as Perrin Exhibit No. 5. Objection.

Q. Mr. Perrin, have you prepared a statement comparing the Atlantic Coast Line Railroad per car revenue on logs interstate and in Florida intrastate with per car revenue on other commodities moving intrastate in Georgia, and if so, please explain it.

A. I have here such a statement. This is similar to the statement just discussed with respect to intrastate movements in Florida. These figures reflect transportation over the Atlantic Coast Line Railroad. The Atlantic Coast Line Railroad operates across the Southern part of Georgia some thirty to seventy miles from the Florida border. The transportation conditions in that part of Georgia are very nearly the same as those in Florida. From my experience in mak-[fol. 1496] ing rates and having dealings with the transportation of freight, I have applied that knowledge of the conditions and circumstances of the State of Florida and Georgia and other states in the Southeastern parts of the United States in so far as the transportation of logs is concerned. The relation of the Florida intrastate rates on logs, the Cummer scale, with Georgia rates are: For fifty miles the Cummer scale on logs in Florida is 2.1 cents per one hun-

dred pounds and between points in the State of Georgia intrastate the rates are on common brick five cents per one hundred pounds; on gravel and sand four cents per one hundred pounds; on lime 6.8 cents per one hundred pounds and on cement eleven cents per one hundred pounds. The comparison in revenue is that logs on the Cummer scale produce $11.55 and on brick within the State of Georgia the revenue is $33.29, and on sand and gravel $37.02 within the State of Georgia and on lime within the State of Georgia $34.00 and on cement within the State of Georgia $77.81. First, taking 170 miles the rate under the Cummer scale is 3.7 cents per one hundred pounds.

Q. At one hundred eighty miles what is the rate?

A. The Cummer rate at 170 miles and beyond 170 miles and at 180 miles, the rate prescribed by the Georgia Commission applies is 8.33 cents per one hundred pounds. Between 170 to 180 miles the Cummer scale of rates jumps nearly five cents or more than doubles. After you have passed the 170 mile figure the interstate rate and the Florida intrastate rate are more nearly equal, some slight difference in Florida intrastate rates, the Class P rates being slightly less than interstate rates. After 170 miles the rates on logs in Florida [fol. 1497] are Class "P" rates. For 200 miles the Florida rate on logs is 8.33 cents for 100 pounds, while the Georgia intrastate on common brick is 8.5 cents per 100 pounds. For the same two commodities for the distance of 250 miles the Florida intrastate rate on logs is 9.17 cents per 100 pounds, while the Georgia rate is 9.5 per 100 pounds. The same kind of relationship exists in gravel, sand and lime and cement with the Florida log rates. After passing 170 miles the log rates in Florida and gravel and sand rates in Georgia are more nearly equal, although the sand and gravel rates in Georgia are slightly less than the log rates in Florida.

"Q. Is there any reason, transportation reason, within your knowledge, which justifies the jump in log rates in Florida after you have passed the 170 mile figure?"

(Objection by Mr. Adair.)

"A. I have made millions of rates in the forty years I have been with the railroad and I never made a rate which had any such precipitous change on anything for ten miles in distance as reflected in this scale between the rate under the

Cummer scale and rate under the Class 'P' scale. The Class 'P' scale does not have any application below 170 miles so long as the Cummer scale continues in effect. In other words, the Cummer scale is substituted for the Class 'P' rate up to 170 miles, and beyond that the Class 'P' rates remain in effect.

"Q. Mr. Perin, I show you a map, or rather a series of four maps, intended to illustrate in a graphic way the difference between the rate schedule known as the Cummer scale and the rates fixed by the Interstate Commerce Commission for interstate and intrastate transportation. Please look at this page, marked 'Map # 1,' and the center point is Perry, and in the green lines is shown the distance which would be [fol. 1498] covered by the interstate scale, or Interstate Commission scale, and the one in red lines being the distances which are covered by the rates under the Cummer scale, and please state, looking through those four maps, whether or not they represent in a graphic way the difference between the purchasing power in the matter of transportation of these two rates?"

(Objection by Mr. Adair.)

"A. This shows very graphically the limited extent to which an operator in Perry, Fla., could reach out from Perry and secure logs in competition. If he paid the same scale as fixed by the Interstate Commerce Commission for interstate application in competition with the operator operating under the Cummer scale the rate under the Interstate scale for 10 miles is 2.5 cents while under the Cummer scale the operator could go practically 100 miles at a rate no higher than under the interstate scale for ten miles. The rate under the interstate scale for twenty miles would enable them to reach out on a rate of 3 cents per 100 pounds while the competitor operating under the Cummer scale could reach practically 125 miles in distance at the same rate; and under the interstate scale the rate for thirty miles distance from Perry is 3.5 cents per 100 pounds, while an operator under the Cummer scale could reach practically 170 miles at the same rate. And the same is true of other points of origin mentioned.

(Map filed as Perrin Exhibit #7.)

I have prepared a statement comparing the Atlantic Coast Line per car revenue or logs interstate, and in

Florida intrastate, with the car revenue on other commod-
[fol. 1499] ities moving between Atlantic Coast Line stations in Georgia, and on the other hand a statement on the Atlantic Coast Line in Florida, north, from High Springs, Florida. This is a comparison similar to that shown in Exhibit #6. The difference between exhibit 8 and exh ts 5 and 6 is merely in the rates and earnings on brick, sand and gravel, lime and cement, and in this exhibit 8 that is dealing with the Georgia-Florida interstate rates on these commodities as contrasted with logs interstate in Florida and logs intrastate in Florida. Taking the distance of 50 miles again we have an interstate rate on logs of 4½% cents per 100 pounds, the Cummer scale of 2.1 cents per 100 pounds, and the interstate rate on Georga and Florida on common brick of 5 cents per 100 pounds, on gravel and sand 4 cents, on lime 6.8 cents, and on demand 9 cents per 100 pounds. Similarly explaining the comparison per car earnings, the Cummer scale produces $11.55 per car of logs, while the interstate scale provides $24.75 per car. The interstate scale on brick provides earnings of $33.29, and on gravel and sand $37.02, on lime $34.00 and on cement $63.67 per car. In this exhibit I am dealing with transportation over the Atlantic Coast Line; those rates and revenues are within my knowledge. As I have pointed out heretofore, the Florida in-
[fol. 1500] trastate rate on logs under the Cummer scale at 170 miles is 3.7, and the interstate rate on logs at that point is 8 cents, and on brick 8 cents, and on gravel and sand 6.5, lime 11.2, and cement 13.5.

Taking this next figure in these commodities, that is 180 miles, on logs on interstate movement the rate is the same for both 170 miles and 180 miles, and that is true of common brick. On gravel and sand there is a difference of one-quarter of 1 cent, while on lime and cement it is the same for both distances. The log rate at 180 miles interstate and intrastate go very closely together, and they go very close together with common brick and somewhat close together on sand and gravel, and the lime remains at 11.2 and the cement at 13.5 cents. The transportation referred to in exhibit 6 is also Atlantic Coast line, and this is true of exhibit- 5, 6 and 8; all of these things are within my knowledge.

(A statement showing the average distances hauled and revenue results from the transportation of various commodities of the lowest transportation (Tes. p. 180) characteristics moved on the Atlantic Coast Line Railroad during the month of May 1926 was offered as Perrin Exhibit #9. Objection by Mr. Adair.)

In exhibit #9 I have selected seventeen commodities constituting the lowest grade of traffic by the Atlantic Coast Line Railroad. For the month of May 1926, there is shown the revenue per ton on each of these seventeen commodities, the average number of miles hauled and the revenue per ton mile. The commodities selected are cotton, seed, cotton seed hulls, clay, gravel and sand stone, asphalt, salt, ice, phosphate rock, cord wood, cross ties, rosin, cement, brick-artificial stone, lime plaster, fertilizer and logs. Those commodities, as being comparable with logs, of course vary in the extent to which they show by a comparison of rates or cross relationship of rates, but they are all included in 53% of the tonnage that the Atlantic Coast Line Railroad Company handles. In other words, 53% of the Atlantic Coast Line tonnage consists of these low grade commodities. The average is shown separately as to each commodity. It of course varies from 57 miles [fol. 1501] in the case — ice up to 262 miles in the case of salt, or 263 on asphalt. The revenue per ton on logs is 72 cents, which is lower than any other commodity, the next approaching it being on cord wood at 80 cents. I want to state, however, that revenue per ton has no special significance without considering the distance involved. For instance in the case of logs the average haul is 109 miles, with a return per ton of 72 cents. Now, on cross ties the average haul is very much the same, 115 miles, and the revenue per ton is 80 cents, and—no, on cross ties the revenue per ton is $1.45; on gravel and sand the average haul is 120 miles and the revenue per ton 88 cents. Perhaps the more convincing comparison is in the revenue per ton per mile, and in considering revenue per ton per mile there is to be considered also the principle that while rates per 100 lbs. or per ton normally increase with the distance that a properly constructed scale for distance rates would produce revenue per ton per mile that slightly reduces with the distance. So, that is the distinction between

per ton and per ton per mile. Now, we show in this exhibit that logs produce revenue per ton per mile on an average haul of 100 miles 6.6 mills, taking into consideration that approximately one-half of all of the logs that the Atlantic Coast Line Railroad handles, and handling them within the State of Florida, are handled under the Cummer scale, the necessary inference is that the effect of the Cummer scale upon the revenue on logs has been very substantially to reduce the rates per ton and also per ton per mile, so if it was practical to differentiate logs under the Cummer scale from logs on the system as a whole you would find under the Cummer scale logs produce revenue per ton per mile far below the 6.6 mills presented on this statement, because as I have already shown the rates in the other states and the rates for interstate movement are substantially higher than the Cummer scale. This exhibit #9 deals with transportation over the Atlantic Coast Line Railroad including the whole system and including Florida.

[fol. 1502] (Objection by Mr. Adair to question of what is considered the minimum or profitable earnings revenue per ton mile on the Atlantic Coast Line Railroad.)

It is not true that we are losing money on all we are handling. We hope and believe that we don't handle anything without some meager profit, but as to my knowledge of the minimum placed upon per ton per mile over a cost of the service, I myself issued instructions to the Atlantic Coast Line Railroad Company's agents prior to the war, when expenses were not more than 50% of what they are today, I instructed them as a basis of the cost of transportation for close materials which of course the company would not want to handle without revenue profits, the traffic should be dealt with in 5 mills per ton per mile, and produced that result from a study of the costs of that time. Naturally with the conditions existing now, the cost of operation, they are almost double. The same conditions existed from Feb. 8, 1929, to March, 1931. The cost of transportation was very much greater than when I fixed it at five mills; they were a little greater then than now, because of the fact that there has been some recession in the cost of material, and there has been a reduction of ten per cent in wages and salaries, which was in 1932.

Court: I notice you are comparing the revenue per ton for logs with all of these other products, and as I say, won't the number of tons you could put in a car play a part in how much net revenue you could derive from it?

A. You are right about that. This does not run to the earnings per car, this is merely earnings per ton. The commodities in Exhibit #9 which load less than logs are cotton seed, cotton seed hulls, ice, cord wood and fertilizer. (Tes. p. 185.) This exhibit #9 shows that the revenue per ton mile on the whole system is 6.6 mills, and I have testi- [fol. 1503] fied that the Cummer scale would be less than that.

Q. In your judgment as a traffic man please say whether or not transportation of logs on any such low ton mileage return would be reasonable or compensatory?

(Objection by Mr. Adair on ground that the witness has shown no qualification to warrant his testifying whether that rate is remunerative and there is no evidence upon which to base any such statement.)

A. Under the conditions of expense of operation in 1930, and 1929, the return was less than 6.6 mills per ton mile, and was unremunerative. That applies also to the first part of the year 1931. It applied continuously all through this period.

Hearing then adjourned until 10:00 A. M. following morning.

Hearing then reconvened. Present as before.

Mr. PERRIN recalled to stand. Examination continued by Mr. Alston.

(Mr. Perrin continuing to testify.)

On exhibit #9, as I testified, the revenue per ton mile on logs as shown on this exhibit is 6.6 mills. That represents the per ton per mile earnings for that period of time on all of the logs the Atlantic Coast Line Railroad hauled on its system, whether it was hauled in Florida, Virginia, North Carolina, South Carolina, Georgia or Alabama, interstate or intrastate. With the Cummer scale of rates applying to the traffic moving in logs intrastate over the Atlantic Coast Line Railroad in Florida it would not pro-

duce a ton mileage equivalent to 6.6 mills per ton miles. I am testifying from my own knowledge, necessarily, and I think I made the statement before, with the system earning this six mills per ton per mile, and approximately half the logs being in the state of Florida, and the rates in all other situations being higher than those in the State of Florida, it is a mathematical certainty that the per ton per mile on the logs under the Cummer scale was less than for the system as a whole. I went to school for a good many years, and I know the average there that the other produced, and in figuring that I then thought the lower basis must carry [fol. 1504] with it a lower figure than the average. May I add this to a statement in the record made just before we adjourned, Mr. Adair had made the statement that the Atlantic Coast Line had lost on the traffic—all of its traffic. That of course does not run to this per ton per mile proposition, nor does it run as to the result of handling of any particular articles of commerce. His statement was true in this respect, that the volume of our traffic has not been sufficient to produce an aggregate revenue sufficient to cover operating expenses and fixed charges, but that does not necessarily mean that we are handling all of our traffic at revenue less than the out of pocket cost for the service. In other words, with the possible exception of the logs under the Cummer scale, I don't know of any traffic that we have handled that we have lost money in the handling. When I say we have lost money in the handling I do not mean by that to include fixed charges on the road, such as taxes and interest, and charges of that sort. Any handling is out of pocket cost for transportation of the traffic. I testify from my knowledge of the situation. I have not myself prepared any figures to show whether we lost money or not, but in making the rates we carefully figure the cost of it before we ever make the rate. About losing money on logs, it may be a matter of opinion with me, but opinion linked with those rates, my experience in making those rates, my long experience in connection with the Atlantic Coast Line Railroad.

Mr. James Menzies was freight traffic manager of the Atlantic Coast Line Railroad at the time the Cummer Scale was filed as a rate. He had been connected with the Atlantic Coast Line Railroad for a long time. He is dead now. Mr. J. H. Trench was a rate expert for the Railroad

Commission of Florida. I have a letter from Mr. Trench to Mr. Menzies, dated Oct. 9, 1914, and marked "File 3685." (Producing letter.) The railroad commission of Florida objected to these rates at the time they were offered—for [fol. 1505] the reason stated in the letter of Oct. 9, 1914. They further stated objection in letter of August 18, 1915, addressed to Mr. E. C. McLeod, and signed by R. Hudson Burr, Chairman, substantially the same character of letter.

(A comparison between the rate under the Cummer scale, expressed in cents per hundred pounds, and the present interstate scale on logs, in comparison with various scales approved or prescribed by the Interstate Commerce Commission was offered as Perrin Exhibit #10. Objection.)

(Mr. Perrin continuing:) The first column is headed "miles"; that simply means the distance the traffic moves. The next is headed "Cummer scale"; that is the rate per 100 lbs. for each mileage shown opposite in the first column on logs under the Cummer scale—moving intrastate in Florida. The next heading is "Chattanooga Scales, 30 ICC 36, 35 ICC 163"; in that column are rates prescribed by the Interstate Commerce Commission in the records to which ICC reference is made. The Atlantic Coast Line does not participate in these rates. The next column is headed "Nashville Scale, 68 ICC 181." That is a scale of rates put into Nashville by the Interstate Commerce Commission in the case reported in 68 ICC, 181. The rates which I have noted under that column of that class were gotten from that case. The next column is headed "Mobile Scale 146 ICC 317," and it is divided into two columns, "A" and "B." These were two lists of rates prescribed by the Interstate Commerce Commission for Mobile as reported in 146 ICC, 317, the first column being for single line application for one railroad from origin to destination, and the second column being for application for two or more lines from origin to destination. The rates in each of these columns are taken from that report. The last column is headed "Barbourville Scale, 159 ICC, 749." That is a scale applicable to Barbourville, Kentucky, fixed by the Interstate Commerce Commission as reported in 159 ICC 749. The rates shown in this column were taken from the record of the Commission's report in that volume. [fol. 1506] These rates shown under these respective

columns can be checked on the respective ICC reports to which I have referred.

Taking about 50 miles and comparing the Cummer scale rate with the Chattanooga, the Nashville scale, the Mobile scale "A" and "B", and the Barbourville scale, under the Cummer scale——

(Objection by Mr. Adair.)

The rates in the cases which I have quoted are in effect now, and were in effect on Jan. 26, 1932, and had been in effect since the promulgation of the decisions of the Commission—the decisions referred to at the head of these columns. They apply to any kind of logs, except foreign logs, such as cedar. They apply to pine log. The rate for 50 miles under the Cummer scale is 2.1 per hundred pounds, under the Chattanooga Scale it is 5¢ per 100 pounds, under the Mobile scale, under the single line, it is 5¢ per 100 pounds, and under the joint lines it is 6¢ per 100 pounds, and under the Barbourville scale it is 4.5¢ per 100 pounds. For the 100 miles distance, under the Cummer scale it is 2.6¢ per 100 pounds, while the rate under the Chattanooga scale is 8¢ per 100 pounds, Nashville scale 10.5¢ per hundred pounds, Mobile Scale, under Column "A", 6.5¢ per hundred pounds, column "B" 8¢ per hundred pounds, and under the Barbourville scale it does not appear under that distance, as that scale only runs to 85 miles. The Cummer scale is tremendously lower than those scales. (Tes. p. 195.)

(A statement showing percentage relationship that Atlantic Coast Line interstate log rates and log rates under the Cummer scale bear to lumber rates prescribed by the Interstate Commerce Commission in the Meridian case, 60 I. C. C. 5; also to basic mileage scale of lumber rates approved by the Interstate Commerce Commission for application between southeastern and Carolina territories, was introduced as Perrin Exhibit #11. Objection by Mr. Adair.)

(Mr. Perrin continuing:) In Column "A" are shown [fol. 1507] rates up to 200 miles prescribed by the Interstate Commerce Commission as reported in 60 I. C. C. 5, on lumber in cents per 100 pounds to and from Meridian, Miss. Column "B" shows rates applied by the Interstate

Commerce Commission in its Docket #2479, for application in all points in the southeastern and Carolina territories, on lumber in cents per 100 pounds. The third column shows the interstate rates prescribed by the Interstate Commerce Commission for application on the Atlantic Coast Line Railroad. Those rates are taken from the Atlantic Coast Line tariff; I know those rates of my own knowledge. The Atlantic Coast Line Railroad participates in the scale of rates, or the rates referred to and prescribed in the column "B". That scale of rates applies for every point on the Atlantic Coast Line in Georgia and Alabama, to every point on the Atlantic Coast Line in North Carolina or South Carolina. It applies generally over the Atlantic Coast Line system and generally over other systems. The Cummer scale in cents per 100 pounds in the fourth column is simply the Cummer scale rate which we have mentioned so often. Under the next column, headed "Percentage relationship that A. C. L. R. R. Interstate Log Rates bear to the Lumber Rates" there are two columns, marked "A" and "B". The first column shows what percentage of the rates to and from Meridian is represented by, or, that is, the lumber rates to and from Meridian is represented by the interstate log rates of the Atlantic Coast Line. The second column shows the same information as to the lumber rates between Southeastern and Carolina territories. For instance, for 25 miles the Commission prescribed in the Meridian case on lumber 7¢ per 100 lbs., while the Cummer scale for that distance is 1.71¢ per 100 lbs., while the interstate scale for the Atlantic Coast Line is 4¢ per 100 lbs. The interstate scale on logs represents 57.1% of the rate on lumber to Meridian and it represents 61.6% of the rate on lumber from the southeast to Carolina territories. Sim- [fol. 1508] ilarly the rate under the Cummer (Tes. p. 200) scale is 24.4% of the rate to Meridian on lumber, and 26.3- of the lumber rate from the southeast to Carolina territories.'

These last two statements are shown under the last column of this exhibit, headed "Percentage relationship that Cummer scale of log rates bear to the lumber rates in column", and that is sub-divided into columns "A" and "B". Column "A" is the percentage of the Cummer scale of log rates is as of the lumber rate to Meridian. Column

"B" is the percentage of Cummer scale for log rates is of the scale of log rates for southeastern territory. When I say to Meridian I mean the rates prescribed in the first column, 60 I. C. C. 5. The figures which lie in the last two general columns, each being headed "percentage relationship" are within my own knowledge. The basic scale of lumber rates, as applied in the Southeastern and Carolina territories, that is the rates under the second column of this exhibit, for instance "B", are within my knowledge; and the Atlantic Coast Line interstate log scale rates are within my knowledge. We are using those all the while.

I have made up a statement showing Cummer scale (in cents per 100 pounds), in comparison with 65% of 6th Class rates in Central Territory generally applicable therein on logs. I have dealt with 65% of 6th class rates in central territory because in its docket #13679, in 85 I. C. C. 533, the Interstate Commerce Commission prescribes the rate on logs in central territory as 65% of the 6th class rates, as the prescribed rate on logs.

(This statement offered as Perrin Exhibit #12.)

On that statement is simply a statement of miles. The second column is the Cummer scale. The third column shows the sixth class rates in central territory, and the fourth and last column shows the rates per 100 pounds, which are arrived at on a basis of 65% of the sixth class rates. I mean the rates on 100 pounds of logs.

(Objection to the introduction of the exhibit by Mr. Adair.)

[fol. 1509] The sixth class rates in central territory is the rate that is applicable on all class of traffic that are included in the sixth class in classification. In central territory sixth class is usually car load traffic and applies on most of car load traffic, except on such traffic as has particular and special commodity rates. Commodity rates are almost generally lower than class rates. Almost every important commodity has a commodity rate in the South but not in the north. In this territory the rate fixed for logs was 65% of that sixth class. The central territory is the territory east of the Mississippi River, north of the Ohio River and West of Pittsburgh, and south of Buffalo.

It includes what is ordinarily referred to as the middle west. The traffic in that territory is very greatly in excess of the traffic in Florida. The relation between the Cummer scale and the 65% of the Sixth class in central territory at 50 miles is: Under the Cummer scale the rate for 50 miles is 2.1¢ per 100 pounds, and in the central territory the rate for the same mileage would be 7.8¢ per 100 pounds. Taking the rate for 170 miles, under the Cummer scale the rate is 3.7¢ per 100 pounds, while the rate is 12.35¢ per 100 pounds in the central territory.

I have prepared a statement showing the Cummer scale (in cents per 100 pounds), in comparison with 65% of the lumber scale approved in I. & S. Docket No. 2479, lumber and forest products between Southern points and destinations in Virginia, 157 I. C. C. 280.

(This statement offered as Perrin Exhibit #13. Objection by Mr. Adair.)

This exhibit shows comparison of 100 pounds scale of logs under the Cummer scale with 65% of the lumber scale applicable on lumber for interstate applicable between southeastern and Carolina territory. I use 65% because the Interstate Commerce Commission used 65% of lumber rates as a basis of rates on logs from North Carolina terri- [fol. 1510] tory to points in New Jersey, and also on logs from points in Virginia to Baltimore. Now, having shown in the first column the distance, the second column the Cummer scale, and in the third column the lumber rates that apply between southeastern and Carolina territory, there is shown in the last column the rates as they would be if made, the log rates. They would be, if made, 65% of that lumber scale. For instance the 50 mile rate under the Cummer scale is 2.1¢ per 100 pounds, and the lumber scale in the South is 8.5¢ per 100 pounds, and the log rate, if made, 65% of the lumber scale, would be 5.53¢ per 100 pounds. Similarly for 170 miles, the Cummer scale produces a rate of 3.7¢ per 100 pounds, the lumber scale is 15¢, and the log rate if made 65% of the lumber rate would be 9.75¢ per 100 pounds. (Tes. p. 205.) The Interstate Commerce Commission in numerous cases in other territories has used 65% as a relationship between lumber and logs. The 65% basis, the I. & S. 2479 scale was adopted

within the last two years, and it is in effect now. It went into effect about two years ago.

I have made an examination of the relation between, or comparison between the per ton mile per car in revenue derived from the Cummer scale in comparison with suspended rates on Ex-lake Iron Ore from the lower Lake Erie Ports to points of destination; I have made an exhibit of same which I will offer as Perrin Exhibit #14.

(Objection by Mr. Adair.)

This exhibit contains rates and revenue results under the Cummer scale of log rates with the rates and revenue results that would have existed if the Interstate Commerce Commission had allowed to go into effect rates issued by the carriers from lower Lake Erie ports to the destinations shown in the exhibit on iron ore. The case before the Interstate Commerce Commission was a suspension case and the point at issue was whether the rates proposed by the carriers were sufficiently high. The commission found that the rates proposed were too low and refused to let them go into effect on that account. The Cummer scale of rates [fol. 1511] are very much lower than the suspended rate on ore. Ore is a low grade of commodity from a transportation standpoint and logs are a low grade of commodity. They are both heavy loading commodities and both are relatively of small value for a unit of volume. Now, I think it would be well to take the first line of figures in this exhibit. The average distance from the lower Lake Erie ports to Youngstown, Ohio, is 63 miles. The railroads in that territory had issued tariffs, containing from and to these points a rate of 73¢ per ton of 2240 pounds on iron ore, which is equivalent to 3.26¢ per 100 pounds. The rate under the Cummer scale for 63 miles is 2.3¢ per 100 pounds. The net ton mile return under the suspended ore rate would be 10.3 mills, while the net ton mile under the Cummer scale on logs is 7.1 mills per ton mile. The earnings per car on the ore would be $38.79, while for the same distance under the Cummer scale the earnings per car would be $13.80. The earnings for the car per mile on ore is 61.6 cents and under the Cummer scale for the same distance it is 21.2 cents. These figures are on 60,000 pounds on the Cummer scale and 119,000 pounds on the other. Those figures are shown on the third page of my Exhibit 14.

I have made a comparison between the Cummer scale of rates in cents per 100 pounds, and per ton-mile and per car and per car-mile revenue derived therefrom, in comparison with rates on charcoal, and per ton-mile and per car and per car-mile revenue thereunder, which I will number Perrin Exhibit #15.

(Objection by Mr. Adair on ground that citation of reports is not admissible and that the rate comparisons are not admissible and have no probative value. Argument on objection. Tes. p. 208-215.)

This exhibit #15 consists of two sheets, and compares rates and revenue results on logs under the Cummer scale with rates and revenue results on charcoal as prescribed by the Interstate Commerce Commission in 168 I. C. C. 633, for application on the Atlantic Coast Line Railroad and connecting lines. This exhibit is composed of two series [fol. 1512] of columns one of them headed "Cummer Scale", and the other "Charcoal". The Cummer scale of rates per 100 pounds are the rates involved in this proceeding and applicable at this time and prior to the beginning of the proceeding on the Atlantic Coast Line in Florida, in distances up to 170 miles. The next series of columns is the charcoal rate on the Atlantic Coast Line, and prescribed by the Commission in the manner I have stated. I have knowledge of these rates in their application on the Atlantic Coast Line. Under the Cummer scale the log rate for 50 miles is 2.1¢ per 100 pounds, while the prescribed rate on charcoal for the same distance is 13¢ per 100 pounds. Under the Cummer scale the revenue ton mile is 8.4 mills and on charcoal 52 mills. The per car revenue on 60,000 pounds of logs is $12.60 under the Cummer scale, while on the charcoal with a car loading of 28,000 pounds the revenue is $36.40. The earnings per car per mile under the Cummer scale on logs is 25.2 cents, while on the charcoal it is 72.8 cents. A like comparison holds throughout the 170 miles.

I have prepared an exhibit showing the Cummer scale of log rates (in cents per 100 pounds) with per ton-mile and per car and per car-mile revenue derived therefrom, in comparison with rates on cement, and per ton mile and per car and per car-mile revenue thereunder. I will introduce that as my exhibit #16. Exhibit #16 is a comparison of rates, the revenue results from logs under the Cummer

scale with rates and revenue results under rates prescribed by the Interstate Commerce Commission for cement for application throughout the South, in 132 I. C. C. 427.

(Objection by Mr. Adair.)

Taking the distance of 50 miles the rate on logs under the Cummer scale is 2.1 cents per 100 pounds, while the rate prescribed by the Commission on cement is 11¢ per 100 pounds. The per ton mile under the Cummer scale on logs is 8.4 mills and on cement as prescribed by the Commission 44 mills. The earnings per car under the Cummer scale on logs, 60,000 pounds, is $12.60, while under the rates prescribed by the Commission on cement the earnings per car are $81.40 per car 74,000 pounds. The earnings [fol. 1513] per car mile on logs under the Cummer scale is 25.2 cents and on cement as prescribed by the Commission the earnings per car mile is 162.8 cents. These rates are applicable over the Atlantic Coast Line Railroad in Florida, and are within my direct knowledge. I know their daily use.

I have made a comparison with the Cummer scale rates in comparison with rates on old, worn-out bags which I will mark Perrin Exhibit #17. This statement compares the rates and revenue results on logs under the Cummer scale with similar results under rates prescribed by the Interstate Commerce Commission on old worn-out bags, the Commission having prescribed those rates in a case against the Atlantic Coast Line, Ware Brothers Agency vs. Atlantic Coast Line Railroad, et al.; that is quoted in 167 I. C. C. 87.

(This statement offered as Perrin Exhibit #17. Objection by Mr. Adair.)

For a distance of 50 miles the rate under the Cummer scale on logs is 2.1¢ per 100 pounds, while the rate prescribed by the commission on old bags for the same distance is 15¢ per 100 pounds. The per ton mile earnings on the logs under the Cummer Scale are 8.4 mills, and on the bags under the rate prescribed by the Commission, 60 mills. The earnings per car on the logs under the Cummer scale is $12.60, while on the bags under the Commission rate it is $49.50, the load of logs being 60,000 pounds under the Cum-

mer scale, and the loading of bags being 33,000 pounds per car. This car mile earnings on logs in cents per mile under the Cummer scale is 25.2 cents, and on old bags 99¢ per car mile. Similar comparisons are shown for all distances up to 170 miles. Those rates are within my knowledge; they are in constant use over the Atlantic Coast Line Railroad Company.

I have prepared a statement showing Cummer scale of log rates, in cents per 100 pounds, and per ton-mile and per car and per car-mile revenue derived therefrom, in comparison with rates on hay. I will mark it Perrin Exhibit #18. This is based on comparison of rates and [fol. 1514] revenue on logs as compared with rates and revenue on hay, as between the Cummer scale and the rate prescribed by the Interstate Commerce Commission in 146 I. C. C. 664, for application into Southern territory including all points on the Atlantic Coast Line. For a distance of fifty miles the distance there, the rate under the Cummer scale for logs is 2.1¢ per 100 pounds, while on hay the rate prescribed by the Commission is 16¢ per 100 pounds; the revenue per ton mile on logs under the Cummer scale is 8.4 mills and on hay 64 mills, under the rate prescribed by the Commission. The revenue per car for logs under the Cummer scale is $12.60 for 60,000 pounds, while the revenue on hay is $38.40; the per car mile earnings on logs is 25.2 cents, while on the hay it is 76.8 cents.

(This statement offered as Perrin Exhibit #18. Objection by Mr. Adair.) (Tes. p. 220.)

Within my knowledge these rates are in daily use over the Atlantic Coast Line.

I have prepared a statement containing a comparison of the Cummer scale of log rates and rates on fertilizer.

(Statement offered as Perrin Exhibit #19. Objection by Mr. Adair.)

The fertilizer rates were prescribed by the Interstate Commerce Commission after a general investigation and this scale of rates has uniformly applied throughout the entire South, even in the State of Florida, which is one of the few exceptions to the conditions to which I have previously referred, wherein rates into and out of Florida are

on a slightly higher level than elsewhere. Those rates are applicable throughout the entire South, over the Atlantic Coast Line Railroad of course, and they are being applied over the Atlantic Coast Line every day, within my knowledge. For fifty miles the rate under the Cummer scale is 2.1¢ per 100 pounds, while for the same distance the rate on fertilizer is 165 cents per net ton, equivalent to 8.25 cents per 100 pounds. The revenue per ton mile under the Cummer scale is 8.4 mills and under the fertilizer scale 33 mills; the revenue per car, 60,000 pounds, for logs is $12.60 per car, and on a car of 48,000 pounds of fertilizer is $39.60 per [fol. 1515] car. The revenue per car mile under the Cummer scale on logs is 25.2 cents and under the fertilizer scale is 79.2 cents. Like comparisons hold throughout. This statement is based upon the average loading, 48,000 pounds, while with logs the average loading on the Atlantic Coast Line in Florida was 58,000 pounds in 1930. Fertilizer is not only a low grade commodity for transportation determination, but is one of the commodities on which the lowest possible rates are made consistent with the maintenance of the transportation system, the theory being, that fertilizer rates are made low in order to foster agriculture.

Cullet is broken glass, old broken bottles and scrap glass. I have made a comparison between the Cummer scale of rates and rates on cullet. I offer that statement in evidence, as Perrin Exhibit #20.

(Objection by Mr. Adair.)

The rates on cullet prescribed by the Interstate Commerce Commission are in I. & S. Docket No. 3459, 169 I. C. C. 153, for application between points in the South, including all points on the Atlantic Coast Line. The rates on Cullet are those which are applicable now and have been applicable since Feb. 8, 1929. Those rates are within my knowledge, and are in daily use over our road. The rate under the Cummer scale on logs is 2.1¢ per 100 pounds, and the rate prescribed on cullet is 10 cents per 100 pounds. The revenue per ton mile on logs under the Cummer scale is 8.4 mills and on cullet is 40 mills. The revenue per car of 60,000 pounds for logs under the Cummer scale is $12.60, and on a car, 60,000 pounds, of cullet is $60.00. The earnings per car mile on the logs under the Cummer scale rate is

25.2 cents, while on cullet it is 120 cents. A like comparison holds throughout, for the whole distance up to 170 miles.

I have made a comparison with the Cummer scale of rates on logs with the rates on common brick in the southeast, which I will mark Perrin Exhibit #21. The rates contained in this exhibit are applicable over the Atlantic Coast Line; they are in daily application, and within my own knowledge they are being daily used. I offer this state- [fol. 1516] ment as Perrin Exhibit #21.

(Objection by Mr. Adair.)

Those rates are based on the decision of the Commission in I. & S. Docket No. 1885, 88 I. C. C. 543. For the 70 mile distance under the Cummer scale the rate is 2.3 cents per 100 pounds, while on common brick for the same distance it is 5½ cents per 100 pounds; the revenue per ton mile on logs under the Cummer scale is 6.6 mills and on brick under the other scale is 15.7 mills; the earnings per car of 60,000 pounds on logs under the Cummer scale is $13.80, while the earnings on a car of 80,000 pounds of common brick is $44.00; the revenue per car mile under the Cummer scale is 19.7 cents on logs while it is 62.9 cents on brick. A like comparison holds throughout, up to 170 miles.

I have made a comparison of rates under the Cummer scale with those of sand, gravel and like commodities. I mark it Perrin Exhibit #22. The rates on sand and gravel which are shown in the two series of columns of this exhibit are applicable over the Atlantic Coast Line Railroad; throughout the exhibit refers to the sand and gravel rate as having been established within the State of Georgia under the order of the Interstate Commerce Commission in 122 I. C. C. 133. (Tes. p. 225.) Within my knowledge those rates were in effect over the Atlantic Coast Line Railroad during the period from Feb. 8, 1929, to March 1931. I offer the exhibit in evidence as Perrin Exhibit #22.

(Objection by Mr. Adair.)

Sand and gravel are one of the very lowest commodities from a transportation standpoint, or from a standpoint of value. The rates are very much lower under the Cummer

scale than the rates on sand and gravel. They are less than a half on the average. The rate for 60 miles on logs under the Cummer scale is 2.1¢ per 100 pounds, while the rate on sand and gravel is $1.10 per net ton or 5.5 cents per 100 pounds. The per ton mile revenue on logs under the Cummer scale is 7 mills, and on sand and gravel 18.3 mills. [fol. 1517] The earnings per car of 60,000 pounds on logs under the Cummer scale is $12.60, and on a car of 100,000 pounds of sand and gravel $55.00. The earnings per car mile on logs under the Cummer scale is 21 cents, and on sand and gravel 91.7 cents. Those are within my knowledge as being applicable over the Atlantic Coast Line on sand and gravel during the period mentioned. Perhaps no rates on the Atlantic Coast Line Railroad are more consistently in use than the sand and gravel rates; I am speaking of the commercial rates, not the municipal rates.

I don't know whether the Florida rates on sand and gravel are lower or higher than those. I have been studying this log case in its various phases about fifteen years. This particular log case, I have participated in all of the hearings that have taken place since the hearing on the Georgia Commission petition to the Interstate Commerce Commission was held.

"Q. From your experience as a traffic man, in long service with the Atlantic Coast Line Railroad Company in its traffic department, from your study of the rate structures in general in the Southeastern States, and your studies and knowledge of the rate structures in general in the Southeastern States, and your studies and knowledge of the rate structures in Florida, and from your studies of this case, from the facts and figures you have submitted, please state whether or not in your opinion the Cummer scale of rates was just and reasonable during any of the time involved, that is, from Feb. 8, 1929, to March, 1931?"

(Objection by Mr. Adair on ground that you cannot establish the standard by the opinion of the witness, and that the witness has not shown himself qualified to testify to any matters as to which he is being interrogated.)

"A. I state unhesitatingly that from my knowledge of the rate structure as a whole, as a result of the operation

[fol. 1518] of the railroad, that the rates on logs under the Cummer scale are unreasonably low."

"Q. Does that apply now to the time beginning Feb. 8, 1929, and running through March, 1931?

(Objection by Mr. Adair.)

"A. Yes, sir."

"Q. Is there any article transported by the Atlantic Coast Line Railroad, or transported during the period mentioned which has like transportation characteristics which carry a rate as low as the rates known as the Cummer Scale?"

"A. I will answer that first by referring to the fact that in the comparisons I have made I have selected no silks and satins of high grade traffic, but I have selected the lowest grade of traffic that can be found in the record as moving on the railroads in the South or elsewhere, and my comparisons have been altogether between the log rates under the Cummer scale with rates that are going rates on other classes of traffic of the same low transportation characteristics as logs, and in some cases of a lower transportation characteristic. I have searched the record to find any rate on any commodity that has no water competition feature, but is uniformly applicable on a normal basis that in any way approaches the low level of the Cummer log rate."

Mr. Alston: "Now, if the Court please, in a matter covering so much territory I might overlook something, and while I am now going to turn the witness over for cross examination, I would like the privilege of questioning him again in the event I have overlooked something."

Mr. Adair: "Of course; we consent to that."

Cross examination.

By Mr. Adair:

"I have searched diligently and have found no commodity at a rate approaching the Cummer scale anywhere transported in the South, from an application generally and not based on some special water competition situation; [fol. 1519] there are a few water competitors of course, and there are a few competitive point rates. I don't mean

to say even then that our water competitive rates are as low as the Cummer scale. I am speaking of our own rate. We have not made any change in the level of our short log scale in the last few years. That scale is applicable throughout Florida generally on short length logs. Of course the comparisons I have made have been with the rates made with the Interstate Commerce Commission. It is not a fact that intrastate rates are lower than interstate rates; I wouldn't say very frequently. I wouldn't say that there are more low intrastate rates than interstate rates; we have some interstate rates that are pretty low. I wouldn't make a broad statement of that kind. (Tes. p. 230.) I don't recall what the short log scale is. My recollection is that it is slightly less than that prescribed by the Commission for long log rates. I don't recall whether our short log scale as a basis shows a minimum of 40,000 pounds per car.

"Q. Mr. Perrin, I hand you what purports to be your Florida local tariff No. 20, and ask you to examine that tariff and see whether or not there is shown in that tariff your short log scale applicable in Florida?"

"A. Yes, sir; although I don't think that this tariff is in effect at this time. My recollection is that the present number of the log tariff is 21, and this is No. 20. I am not sure that there has been a change in the short log tariff, but I am not sure there has not been. For this reason, when the Interstate Commerce Commission order was issued in August 1928 in this case the proceeding at first was considered as applicable on logs of any length. Now, there was a supplemental order issued by the Interstate Commerce Commission that eliminated the short length logs from that decision, but just what effect this supplemental order had on those original rates I don't know. The supplemental order eliminated the short logs from the situation entirely, it left it as it was. We have made no change in the short log rate in Florida since the evolution of the [fol. 1520] whole thing was over, but you remember there were two or three supplemental orders issued, and at first we desired to change the short length logs along with the long logs, and I naturally presume that stood in the condition it was in before the order was made. I am not certain about that. I don't see in this tariff the rates on long

logs, and I don't know what they are; Mr. Alston must have them there. The Cummer scale for 50 miles is 2.1 cents per 100 pounds. The short length log of 40,000 pounds, according to this local tariff No. 20, is $13.00 per car of 40,000 pounds, and that would be 3¼ cents per 100 pounds. The rate under the Cummer scale on long length logs for 170 miles is 3.7¢, while the short length logs according to this tariff would be 6¼¢ per 100 pounds. At 110 miles the rate under the Cummer scale is 2.8¢ and under this tariff on short length logs it is $18.50 per car of 40,000 pounds, which is 4.6 cents per 100 pounds. I have to give you the ratio according to each distance. The short length log scale has been in force and effect in Florida for a good many years. According to that tariff the minimum car there is 40,000 pounds. The minimum of long length logs is 50,000 pounds, under the Cummer scale. As a matter of fact, the average weight under the long length log rate runs substantially over 50,000 pounds. I should not think it is more difficult or expensive to transport long length logs than short length logs. I wouldn't say that your car will have more in weight to the car in long length logs than short length logs, because I think that long length logs would be bigger logs than short length logs. Now, there is this theory about short length logs in Florida, and it is a thing we have handled with the Commission, it is figuring up side down to establish a rate on long length logs lower than short length logs, because short length logs have gone through a direct process of manufacture, having been cut into certain lengths, but the theory on which the short length log rates in Florida are made has been that the [fol. 1521] rates ought to be lower, because it catches a quantity of logs or quality of logs that would not be shipped as long length logs and would be shipped only for the purpose of manufacturing crates and other such products in Florida.

"Q. As a matter of fact the long length log scale has been somewhere in that Cummer scale for some years?"

"A. Well, now, let me see what you mean by that. Do you mean before the Cummer scale was adopted."

"Q. No, I mean since the Cummer Scale was adopted the short length has been higher?"

"A. Yes, sir. And a rough estimate of that difference was in the neighborhood of 50% higher. There are some

commodities that are transported by the Atlantic Coast Line Railroad Company, at least in Florida, if not interstate, that are somewhat lower than those comparison figures produced here; they are lower than some of them. I doubt if lower than all of them."

"Q. Mr. Perrin, how did it happen that the Atlantic Coast Line Railroad put this Cummer scale into effect?"

(Objection by Mr. Allston on ground that the question is fully treated in the record in this case and to prevent a duplication of the record.)

"A. This Cummer scale was initiated or was published as a scale of general application about 1914. It is not correct that the Atlantic Coast Line Railroad established the Cummer scale. The Cummer Lumber Company in connection with the Jacksonville & Southwestern Railroad established the Cummer scale before 1904. (Tes. p. 235.) They made a contract for transportation for a limited distance, 120 miles. That was still in effect when we made the contract with the Carpenter-O'Brien Company, and made that in 1914. That contract specifically related the rates. We had only one commitment, that was the commitment with the Cummer Lumber Company, but it had another feature. We would not have assigned the normal rate on *on* the logs [fol. 1522] for the Carpenter-O'Brien Company as long as we had to apply the Cummer scale to these distances of 120 miles on the same line. The company made the contract with the Carpenter-O'Brien Company in 1914 willingly. We furnished a rate; we published or furnished it as a train load rate. The Florida Commission told us that it had to be furnished as a car load rate or not at all, and we elected to furnish it as a car load rate.

(Objection by Mr. Alston, and argument.)

"The Florida Commission told us to furnish it as a car load scale or not at all, and we elected to publish it as a car load scale. That scale was maintained by the Atlantic Coast Line Railroad Company and applied until the Atlantic Coast Line Railroad commenced in 1929 to apply the scale provided by the Interstate Commerce Commission in this order the Supreme Court set aside. This Brooks-Scanlon Corporation application of the so called scale was

practically wholly within train load movements. The Cummer Cypress Company is party to this suit, and its application on that scale was wholly in train load movements. The Wilson Cypress Company's application of that scale was wholly in train load movements, and the same thing was true of the Putnam Lumber Company as long as it moved. This train load movement of logs was in very large volume. Of course the Railroad Company performed the usual transportation service of moving the cars from point of origin to point of destination. The cars were loaded and assembled on the tracks provided by the lumber company, and the distribution of the cars at the mills was done by the lumber companies. As far as actual moving is concerned, the transportation service performed by the Railroad Company was hooking a locomotive at one end and a caboose at the other end of the train and transporting it from the side track to the mill, but of course there is a great deal more involved in the transportation than the movement of the car. There is accounting, collecting, inspection [fol. 1523] and other features of transportation. I don't think it is a fact that in so far as these train load movements were concerned it moved almost entirely in cars especially equipped by the Lumber Company. In more recent years some of the lumber companies, particularly the Wilson Cypress people, established some patented standard supports on the cars. That, however, was a matter of economy in preventing the necessity of recovering the wooden standard supports. I don't know that it also caused the cars to be loaded heavier. If Mr. McRehney, or one of our witnesses, testified in this proceeding that specially equipped cars, or special equipment was furnished by the lumber company on most of the cars used by them and it did enable the cars to be loaded heavier I wouldn't say that was not true, but I don't think they said that. I don't know just what actual service was performed as terminal service except the original terminal service. It is my understanding that there was no switching of cars back and forth; the delivery was taken in a solid train and delivered in a solid train. This train load movement was specially a shuttle train movement, so many days a week. Back and forth. I don't know what percentage of that movemen[illegible], of the log movement in Florida under the Cum-

mer scale, and since, was train load movement and what proportion was single car movement. I would say a substantial part of it was train movement, (Tes. p. 240) the greater part of it as long as those trains operated. Concerning the Wilson Cypress Company, only the Wilson Cypress Company, recently operating, ever moved any substantial number of logs any other way. The Carpenter-O'Brien Company probably shipped car lots. So far as any legal requirements are concerned, it is correct that that rate so initiated in 1914 was voluntarily maintained by the Atlantic Coast Line Railroad Company, nobody made them maintain it. We were willing in the first instance to enter into a contract to repeat the train load movement of that date. This proceeding here was commenced about May, 1926. The Atlantic Coast Line Railroad had nothing [fol. 1524] to do with the institution of that proceeding before the Interstate Commerce Commission. It was still carrying along this rate willingly, I might say grudgingly. It had made no complaint to any tribunal to relieve it of that obligation as far as I know. The Atlantic Coast Line Railroad in those proceedings before the Interstate Commerce Commission made no attempt to have the intrastate rate increased, up until after the order was made. The order was entered in August, 1928. It is correct that for fourteen years at least this rate which the Atlantic Coast Line Railroad Company installed had been in operation by the Atlantic Coast Line Railroad without protest to any governmental bureau or body. And it was done under a contract which the Atlantic Coast Line voluntarily made. The contract covered only train load movement. In a large part the movement outside was a train load movement. I don't recall that at the former hearing, or rather last Summer in another branch of the hearing before the Commission, that I testified that our interstate movement on our entire system for logs was about one-eighth of our intrastate movement. This record so states, approximately one-eighth. I wouldn't say that there has been no movement or there was no movement in logs from Florida to Georgia over the Atlantic Coast Line Railroad Company between Feb. 8, 1929, which was the date this order of the Interstate Commerce Commission became effective, and the time that the order was set aside by this three Judge Court.

I think we put in the Jacksonville record at the Jacksonville hearing that we knew of none, but we had not investigated it to find out if there had been. As far as I know there was or may have been. I don't know. If there were any it was not large; I don't know of any.

"Q. Now, Mr. Perrin, if it be a fact that your log rates, that your log movements over your lines in Florida has been so substantial in the past and there has been no substantial movement in interstate, how do you account for it?"

[fol. 1525] "A. That would be true in any State. That would be true in any State because logs move to adjacent mills and naturally the shorter hauls are intrastate hauls, the preponderance on short hauls of logs are necessarily intrastate."

"Q. Mr. Perrin, on one of these cases, this Chattanooga case, we have been able to find on one of these reports—I want you to examine the rate prescribed by the Interstate Commerce Commission, 35 I. C. C. Report at page 163—it is your citation, Mr. Alston, on Perrin Exhibit No. 10—you purport to show a rate, which as I understand it was prescribed by the Interstate Commerce Commission for use then, and I would be glad to have you examine that table there and see how you can reconcile that table with the figures shown on your Exhibit #10?"

"Mr. Alston: There is 30 I. C. C."

"Q. I understood you to testify it was in I. C. C. 35 where it was prescribed and the rate was still in effect?"

"A. Do you mean there was an increase in the rate itself shown in here?"

"Q. I am asking you if there is?"

"A. Must be necessarily, because when the report was made the rates stated in the reports were the rates they established, but it was in 1913, and the percentage of increase in rates have brought it up to the rates shown in my exhibit. In 1918 the Railroad Administration made an increase of 25% in all rates, and in Ex Parte 74, the Interstate Commerce Commission made another 25% increase, and then in 1920 and 1922 they took off 10%, the Interstate

Commerce Commission. Now, the exhibit here, the figures in this exhibit are of course the current figures reflecting the changes that have taken place in the rates prescribed by the Commission in 1918. I don't know where is any one change. I have not figured it in each particular case. There are rules for disposition of fractions which would effect it. This exhibit reflects the rates as they stand now as a result of these percentage changes that have taken place since the Commission prescribed the rates. The rates here, or now here prescribed are maximum rates. And the Railroad [fol. 1526] Company had a right to charge a lower rate than the rates prescribed. That was a maximum for the amount to be charged and not fixing the amount charged. That is true in respect to these other exhibits I have here, except in some cases the rates deal with rates actually sustained by the Commission, and the Commission considered them as minimum rates. Certainly the ore rate, that was what the Commission considered the minimum rate and sustained the rate, being what the Commission prescribed as the maximum rate. Ordinarily when the Commission prescribes rates that do not involve a question of remuneration for the States they are prescribed as maximum reasonable rates."

By Mr. Gutheim:

"Q. When you referred several times to circumstances and conditions of transportation, what are the circumstances and conditions that you have in mind?"

"A. I think you will have to make that question a little more specific. I don't know just what connection you have in mind."

"Q. In connection with your rate comparisons, you several times referred to the fact that comparisons were offered in cases where the traffic moved under similar circumstances and conditions. What I want to know is what are the circumstances and conditions you have in mind in making that statement?"

"A. I would say in two situations, the circumstances and conditions from our transportation standpoint would be the same if in those two situations the operations were conducted at an equal cost. When I speak of circumstances and conditions of transportation I have in mind circumstances and conditions that physically reflect in the cost to

the carrier for performing the transportation. The length of haul is somewhat one of these conditions. With some particular exceptions there isn't much difference due to [fol. 1527] grades and curvatures. Of course speaking for the Atlantic Coast Line it is inapplicable, because we have very few grades and curvatures. Where there are mountainous conditions that would make a difference. I wouldn't say the Atlantic Coast Line operated in mountainous conditions in the vicinity of Chattanooga; I would say the Southern Railroad operating between Chattanooga and Knoxville have such conditions. Where you are in the Allegheny or the Blue Ridge as distinguished from the coastal plane you are operating in it. Volume of traffic on a particular movement is a condition that affects transportation costs. The density of traffic on a particular movement also is something that effects transportation costs. The density of traffic on a particular railroad as a whole is a feature that in some way effects transportation costs; particularly in its effect on the net revenue. The minimum rate prescribed as the minimum for the load on which the car load rate applies also effects transportation costs to some slight extent. While I think it is one and the same thing, I say that the average loading per car effects transportation costs to some slight extent. Between a haul where the transportation service of the carrier involves a terminal service for assembling loads at origin point and a terminal service for distributing loads at terminal point, those conditions would unquestionably be different as compared with a haul where no such terminal services were required of the carrier. The character and type of equipment used in transporting a given commodity, whether you use a flat car, box cars or refrigerating car, reflects in transportation costs in a very indirect way. Where the use of the equipment involves damage to the equipment and the shipper pays part of the cost of repairs to the cars, that tends to reduce transportation costs on that particular traffic, very naturally. With respect to the Atlantic Coast Line Railroad, hauls vary in length; and the density of the traffic is different on different parts of the system. The density of different kinds of traffic, log traffic for instance, varies on different parts of the system. Such figures as we have for the average loading are for the whole [fol. 1528] system, and consequently the average repre-

sents the loading on all parts of the system. I wouldn't say that with respect to logs it is a fact that our average loading in Florida is higher than our average loading on the balance of the system. If it appears that way from my exhibit I don't recall that. With respect to any of the rate comparisons that I have offered in my various exhibits I have not made any comparisons of the costs of transportation expressed in money. The so-called Cummer scale of rates is published in our tariff as rates in car loads, minimum 50,000 pounds and excess weight proportionate rather than as rates per 100 pounds. In my exhibit #9 the revenue per ton represents the revenue per ton on the entire movements on the respective commodities as it took place on the Atlantic Coast Line system as a whole. That is true even if we have a transportation of cotton seed from "A" on the Atlantic Coast Line to "B" on the Atlantic Coast Line, all the revenue on that service accruing to the Atlantic Coast Line would be included in the figures that produce our revenue per ton. On this exhibit the revenue per ton of $1.60 represents the earnings per ton on all of the cotton seed that the Atlantic Coast Line Railroad handled. In other words, it is an average, it is a local charge between points on its own line, and the proportion of and our charge on any of the traffic that may have moved from joint haul. In case we handled cotton seed from a point on another railroad to a point on the Atlantic Coast Line, the revenue we would take into account would be our division of rate from the point on connecting line to the point on the Atlantic Coast Line. In a case where the cotton seed or other commodity would be moved from a point on the Atlantic Coast Line to a point on another railroad, there again would be our division out of the through rate from the point on our railroad to the other railroad. There would possibly be a third instance of cases where traffic had moved from a point on another railroad, and then handled by the Atlantic Coast Line and then to a point on a third railroad. (Tes. p. 250.) There we would [fol. 1529] get a division as between three or more railroads; that is true as to logs also. I did say that log traffic as a rule is mostly intrastate business, but a great deal of it is joint haul. The Cummer scale is a single line scale only. This figure in my Exhibit #9 for logs is for the system on logs as a whole just as in the case of cotton

seed that you have discussed, and quite a volume of through logs on the system are interchanged on other lines. On those we get a division of the rate, and this reflects the revenue we got on the logs. The average haul that I show on this exhibit #9 is the average haul on the Atlantic Coast Line. It is correct that some of them may be a haul of traffic hauled on the Atlantic Coast Line Railroad, and in another instance it would mean only a portion of the haul was on the Atlantic Coast Line. As a traffic man I can say that it is correct as a general rule to say that the rate per ton per mile decreases as the distance increases. Looking at my exhibit #10, all of the mileage scales of rates on logs there shown are applicable in the territory that I have referred to as southeastern territory.

"With respect of my exhibit #11, column 'B,' the use of the words 'Basic Scale' implies that there may be other rates different from the basic scale only to this extent, that the basic scale measures the rates in all classes except where there is a grouping of origins or grouping of destinations. In relatively few cases the scale applies for the average distance from a group of origins to a group of destinations, but the scale measures the rates charged as a whole. We have basic scales on many commodities other than logs."

"Q. And do you not have basic scales for many commodities where the greater haul of the commodity is handled on commodity rates applicable for specific hauls?"

"A. We have commodity scales themselves. We will, [fol. 1530] however, if our haul was 150 miles, between the distance between the two points, and the haul by the other line should be 100 miles, necessarily our mileage scale would not apply and we would have to adopt the rate of the short line. Take a commodity like bituminous coal, it is usually carried on commodity rates; there is no mileage scale on coal. We have instances of other commodities where there are mileage scales, and there are specific rates in addition; and the mileage scale applies in the absence of some controlling principle which makes the application of the scale necessary. If there is a specific rate applicable from point to point lower than the mileage scale the specific scale of rates would obtain in lieu of the mileage scale. We do not have point to point rates for commodities generally in this exhibit. We have point to point

rates on logs from western North Carolina to South Carolina, but those rates are measured by our mileage scale supplied by the Interstate Commerce Commission. I think that almost uniformly our log business is handled under rates that are on mileage."

"Q. I show you witness N. M. Price's exhibit #48 introduced in the first proceeding in this case before the Interstate Commerce Commission, and ask you to compare the rates between specific points in North Carolina as there shown to apply on logs with the North Carolina scale applicable on logs shown in your exhibit, and ask you as a matter of fact if those rates are not quite generally lower on the mileage scale applicable in North Carolina as shown by you?"

"A. Remember this, that is submitted by Mr. Price I think in 1926."

"Q. In 1926 or 1927, but they are Atlantic Coast Line rates?"

"A. Yes, in North Carolina, as they were then, and exhibited then. That does not necessarily mean that those rates are in effect today, and I don't think that they are. I don't know that they are not, I am not sure. I know that we are not handling logs under them. I mean under normal conditions we have not been handling them. I don't recall [fol. 1531] whether at the last hearing before the Interstate Commerce Commission proceeding in Jacksonville, about a year ago, I testified at that time in respect to the commodities in North Carolina, to the movement there. I wouldn't say that the intrastate movement of logs in North Carolina is next to that in Florida, the largest on the system now. It was not a year ago. It is not. The intrastate movement of logs in South Carolina is now larger than in North Carolina, except in North Carolina we have a large volume of joint haul rates for Western North Carolina furniture manufacturers. I think I do recall a train load movement that formerly existed in eastern North Carolina, but that train load movement is a thing of the past. I don't recall the distance. No, I didn't say that the movement had ceased because the shipper claimed the rate was so high the traffic could not be moved. I recall what the facts were. What I said then was that formerly that operation was on a rate per 1000 feet, that a shipper was changing his location and movement and wanted us to charge the old rate

per 1000 feet and we had told him that we would apply the rate of the North Carolina Commission and thereupon he discontinued his log movement by the Atlantic Coast Line Railroad. That rate of the North Carolina Commission would be higher than the rate he had previously been charged. (Tes. p. 255.) With respect to these various comparisons of rates, the Cummer scale as compared with other rates in the southeast, I know the general situation that leads me to believe that when those scales were operating the conditions are substantially the same as they are on the Atlantic Coast Line. I don't know that the average hauls of logs are the same. The volume of logs is substantially the same. I mean we have a large log movement and they have a large log movement. Our movement in Florida is substantially one-half of the movement on the entire system; the movement in Florida is large; none in the State of Virginia. I would say that there are no other states in the southeast where the movements of logs are large. I [fol. 1532] don't know of any State in the southeast where they have now a large movement of logs. I don't have any actual figures in mind indicative of the volume of log movement on any railroad in the southeast except the Atlantic Coast Line. I have knowledge that in the Mississippi Valley on the Illinois Central Line there is a large log movement where the traffic is handled predominately in train loads and without origin and destination and terminal service, so far as the delivery and use of cars is concerned. Those rates are shown in my exhibit. I have not outlined those rates to show that is a fact on any one car, but on a number of cars. There is a terminal service. There is not the ordinary terminal service for distributing empties individually, picking up loads individually, and assembling into trains in the sense you would pick up an individual car, but there is always a terminal service. I don't have figures in hand concerning the comparative density in log traffic on these various railroads except in a general way. I do know that some of the lines have equally as much logs as we have, and in proportion to the length some have more than we have. The only figures I have in mind indicative of the general density of traffic on these various railroads is this, that the Atlantic Coast Line is one of the lowest carriers of any line of road in the South. I do not have any other figures to show what the comparison is with other

railroads. They are available of course, because they are in the reports. It has only been a few years ago when there were only two railroads, the Central of Georgia and the Norfolk & Southern Railroad that had lower earnings per mile per road than the Atlantic Coast Line. In other words, we were third from the bottom.

"With respect to my exhibit #1, I have knowledge of the difference in transportation conditions as between central territory and southern territory, particularly as to the tremendous volume of traffic in the central territory that does not exist in southern territory. There is a greater [fol. 1533] density of traffic in central territory. I wouldn't say that there is a considerable difference in the commodities handled, because we handle a great many that they do. There is a large volume of bituminous coal handled in the central territory, but the Louisville & Nashville Railroad was at one time within recent years one of the largest handlers of bituminous coal in the United States. It is possible that about 90% of that goes north of the Ohio River. The main difference between operations in the central territory and the southern territory lies in the different volume of traffic; their earnings are tremendously greater for the same service than lines in the South. They have a volume of traffic that enables them to handle two times as much for a given amount of service than any line in the South would have. I wouldn't say that due not only to the volume of traffic, but to the difference in the classification of the traffic that earnings may again be higher in central territory, in favor of manufactured goods and the like, reflects the difference, because of the fact that they have a very large movement, as you say, of coal and pig iron, and low grade s-uff that is in large, heavy volume, to a greater extent than they have in the South. Of course we know that the larger manufacturers in this country are in central territory and in the east. I wouldn't say that it is true that in central territory you have much more double and multiple track lines than you have in the South. These lines in the central territory have some double track and some of the lines south have double tracks. The Southern Railway is a double track line, the Atlantic Coast Line is a double track line over a great part of its main line, the Pennsylvania Railroad, the Baltimore and Ohio and the Central Railroad are double track lines, but that would be

hard to say whether it is more of a feature of the central territory than the southern.

"Coming to this exhibit #14, iron ore rates, their proposal to reduce iron ore rates was submitted to the Interstate Commerce Commission on May 29, 1922, and decided July 18, 1922. The carriers were met with a reduction of [fol. 1534] 10% in rates in 1922. (Tes. p. 260.) The volume of iron ore as moved from Lake Erie points to the furnaces as compared with logs is in this report. I should not say it is greater. I do not know anything other than is in that report.

"Q. Now, I notice you show these four large iron ore rates as applicable from Lake Erie ports, and do you know from what ports they apply from?"

"A. It is said in this report, together with the destination that I have shown in my exhibit."

"Q. Have you any knowledge of the fact other than what you read in the report?"

"A. My statement is based on the report."

"Q. Have you any personal knowledge of the conditions under which that ore is moved from ship side and then transported?"

"A. It is stated in the report."

"Q. And you have no knowledge other than that?"

"A. The fact is, and the purpose of my exhibit was to show that the Commission for the railroad part of the service condemned the railroad service generally, and proposed by the railroads as good law. But as to the conditions under which the transportation is conducted I personally know nothing."

"Q. Do you know whether these particular movements of iron ore from Lake Erie ports to inland furnaces the rates over one road are applicable over many roads, and many roads of different transportation conditions?"

"A. I suppose some of it is that and some of it is more than that. I know nothing of the conditions over it. I just know the Commission condemned it as being an unremunerative rate. I don't think that whether any of those rates though, large iron ore movements, are part of so called terminal railroad service for handling the ore at destinations, is at all involved in the statement I make, which is [fol. 1535] merely as to the rates proposed by the Railroads and condemned by the Commission, and if that includes

these movements the Commission does not say so. I base my statement on the report of the Commission.

"With respect to my Exhibit #19, we expressly adopted in Florida the same fertilizer scale as applies elsewhere in the South. As a part of the hearing that proposition was made and was done under the order of the Commission as a result of its general investigation. That was the consensus of opinion on the part of the carriers in the interest of agricultural development in the State of Florida. No, there is not a lower level of fertilizer rates in Florida than interstate. I am speaking of the interstate into Florida scale prescribed by the Interstate Commerce Commission interstate into Florida; we are applying the same level into Florida as we apply elsewhere in the South. Concerning intrastate in Florida, I think they have some class "M" rates that are probably lower than the interstate rates. I think you are right that as to that rate the Interstate Commerce Commission have considered that disparity and considered it not unlawful, or at least they found the absence of any discrimination under section 13 of the Interstate Commerce Act. They did not approve of the level of the Florida intrastate rate."

By Mr. Adair:

"Q. Mr. Perrin, do you recall last Summer when you were on the stand in this other proceeding having heard Mr. Gwathmey make this admission: 'As far as the movement of logs from Florida into Georgia during the period since 1929 is concerned, based upon the investigation we were able to make, there has been no such movement' "?

"A. I think he made a statement of that kind."

"Q. He went on to say 'of course there may have been an occasional car' "?

"A. Yes, sir."

(Objection by Mr. Alston as irrelevant and immaterial.)

I recall having heard him make such a statement. Mr. Gwathmey was representing the Atlantic Coast Line Rail-[fol. 1536] road Company as an attorney. As far as I know that statement was correct.

(Objection by Mr. Alston as irrelevant and immaterial.)

"Q. Mr. Perrin, I hand you what was your Exhibit #11, in your testimony in the proceeding before the Interstate

Commerce Commission back in 1927, I guess this was, and ask you to examine that column 'C' there, for short log rates, and tell me, (the Florida intrastate short logs tariff,) and tell me whether or not that scale of rates is still in effect in Florida?"

"A. I think it is. I do not know how long it has been in effect. I couldn't say that it has been in effect as long as the Cummer scale, since 1914, but I know that it has been in effect for several years. It had been in effect for a number of years before 1927."

Redirect examination.

By Mr. Alston:

"I will undertake in a very few minutes to give as accurately as I can a short statement of the history of the litigation resulting in the filing of a petition to the Interstate Commerce Commission by the Georgia Service Commission in 146 I. C. C. page 717. The origin of the so-called Cummer scale and what happened to it since its establishment in 1914. The Atlantic Coast Line Railroad in 1904 purchased the Jacksonville & Southwestern Railroad operating in a southwesterly direction from Jacksonville to Newberry, Fla., something like 85 or 90 miles in length. The Jacksonville & Southwestern Railroad had been originally constructed as a plant facility for the Cummer Lumber Company, and in the sale of the Jacksonville & Southwestern Railroad incident to the sale the Cummer Lumber Company and the Jacksonville and Southwestern Railroad entered into a contract, continuing in effect until 1918, of what we have been using as the Cummer scale log rate, which was called Cummer scale because of the relationship of the Cummer Lumber Company in the [fol. 1537] original adoption of that scale. In 1904 when the Atlantic Coast Line purchased the Jacksonville & Southwestern Railroad it bought along with the railroad this contract, and continued to apply the rates according to the Cummer Lumber Company contract. In 1933 the Atlantic Coast Line and the Carpenter-O'Brien Company entered into negotiations for the movement of saw mill logs from the territory just west of the terminals of the Jacksonville & Southwestern Railroad in Dixie and Taylor Counties, Florida, the logs to be carried over the (Tes. p. 265)

Jacksonville & Southwestern Railroad to Eastport, which is a suburban way point near Jacksonville. At this time the Cummer scale of rates was in effect at Mildale immediately east of Eastport. Now, the matter of the Carpenter-O'Brien Company operating a train load movement was considered. The Atlantic Coast Line entered into a contract to supply so many cars for transporting logs from Dixie and Taylor Counties to Eastport, Fla., and that contract was to continue until the expiration of the movement of one billion feet of timber. That contract was executed in 1914, and when the agreement was made in 1913 the Cummer Lumber Company contract had still five years of life, as it was to expire in 1918. The extension of the Lumber Company scale was in proportion of $1.00 per car added to the original Cummer Lumber scale for the additional distance beyond the terminals of the old Jacksonville & Southwestern Railway. The Atlantic Coast Line Railroad under the execution of that contract, filed with the Florida Railroad Commission a copy of the tariff containing this so called Cummer scale applicable to that full train load movement of logs. The Florida Commission rejected the tariff because of the specification of train load movements and finally required that the tariff be cancelled entirely or made to apply on any number of cars of logs, and to apply anywhere within the State of Florida for those distances. The Atlantic Coast Line had executed this contract and [fol. 1538] elected to comply with the contract with the Carpenter-O'Brien Company and in fulfillment of that contract accept the requirement of the Florida Commission to make this scale apply on any number of cars for the same distance anywhere in the State of Florida. Subsequently there was a proceeding before the Georgia Public Service Commission in respect to log rates in the State of Georgia. After a series of hearings the Public Service Commission of Georgia authorized a certain level of rates, in some cases amounting to increases in the then existing Georgia rates. After they had promulgated that new scale of rates the log shippers in Georgia complained to the Georgia Commission about increase in rates in Georgia as long as the Cummer scale was in effect in Florida, stated that they were discriminated against because of this Cummer scale. The Georgia Commission took the matter up with the Atlantic Coast Line and urged that the Cummer scale be abandoned

and cancelled in protection of the interest of the Georgia shipper. The reply of the Atlantic Coast Line was that we had entered into a contract in good faith; and remember that this was in 1925 and 1926 and I am no longer talking about the time in 1913 and 1914, when that contract was made; the Atlantic Coast Line had entered into a contract in good faith and proposed to carry out that contract, and we would have to retain the Cummer Lumber scale, unless and until it was provided in the contract the abandonment of that scale, or it should be abandoned by some government body. It was then that the Georgia Commission filed its complaint with the Interstate Commerce Commission and set up the discrimination against Georgia operators in favor of intrastate shippers in Florida under the Cummer scale. The matter went to a hearing before the Interstate Commerce Commission and they had a procession of hearings, and throughout the entire proceeding the Atlantic Coast Line stated, as Mr. Adair has stated here, that we are not asking the Cummer scales be interfered [fol. 1539] with; we made this contract and propose to carry out the contract, and the only thing we did was to ask that the measure of the Cummer scale be not made the measure of our interstate rate. We felt obliged to resist any result which would spread the Cummer scale throughout the Atlantic Coast Line system. Furthermore during these hearings it was repeatedly stated on behalf of the Atlantic Coast Line that the Atlantic Coast Line owed no obligations whatever to any interests in Florida because of this Cummer scale, except to the Carpenter-O'Brien Company, which in the meantime had become the Brooks-Scanlon Corporation; that we proposed to protect that contract we had made with the Brooks-Scanlon Corporation and we didn't propose and ask that the Cummer scale be interfered with on that account. The matter went to the consideration of the Interstate Commerce Commission and in August, 1928, the Interstate Commerce Commission issued its decision and order requiring the cancellation of the Cummer scale, and it was then that the Brooks-Scanlon Corporation announced to the Atlantic Coast Line Railroad the discontinuance of its log operations to Eastport. It made its arrangements to move its mills into the interior where the timber was. We then announced our obligation to the Brooks-Scanlon Corporation ceased, and we had no

obligation with anyone to maintain the Cummer scale in Florida. It was said here yesterday, I think Mr. Adair, that if there was any bad faith shown in this situation it was by the Atlantic Coast Line Railroad, because we had never until 1929 offered any interference to that scale, but that in 1929 we had come out in opposition to that scale. It is perfectly plain that the Atlantic Coast Line was observing its obligation until the Interstate Commerce Commission eliminated the Cummer scale and after that we had no obligation to anyone to maintain and observe the Cummer scale if we could get rid of it. We realized then and we realize now that under conditions that existed in 1928, when the Commission decided that case that the [fol. 1540] logs were being hauled under the Cummer scale without profit to the Atlantic Coast Line, but nevertheless we carried on the contract. Now if it be said that we voluntarily made the rate, assuming that the Atlantic Coast Line made the Cummer scale and assuming that we had replaced value from a revenue viewpoint on the Cummer scale when issued in 1914, it by no means indicates we take the same view of the Cummer scale today. And I want to call attention to the fact that operating conditions in 1913 were very different propositions from what they were in 1929 and 1930. We will assume in 1913 the Cummer scale had some measure of profit in it, but it doesn't mean it had a measure of profit in 1929 or 1930. The scale has been subject to the percentages increases, wherein the rates under the Cummer scale today are 41¼% higher than the scale was when made in 1913. But expenses of operation have increased to such a tremendous extent and far out of proportion to the increase in revenue under the Cummer scale that there is no comparison at all between the two situations. I have figures here incident to 1913, showing the operating ratio of the Atlantic Coast Line was 68.19. In other words to earn a dollar it cost us 68.19 cents, and in 1930 it had gone to 78.84, and in 1931 to 79.85. Our taxes in Florida have grown or increased between 1913 and 1930. The tax per mile of road operating in Florida increased 288.88%. In 1913 we were paying taxes of $238.46 per mile, and in 1930 we were paying $928.16 per mile. I have here before me a list of 21 of the principal articles that are used in construction, maintenance and transportation of the railroad, including cross ties, timbers, piling, rails, tie plates,

switches, terra cotta pipe, box cars, etc., and it is sufficient to say I think since 1913 the increase in the purchase price of these commodities is 114%, an increase of 114 per cent. from 1913 to 1930.

They are not very different now. I wouldn't say the 1930 level pretty near prevails now; they are less now than in [fol. 1541] 1930. I would say they are at least higher than in 1913. I mean railroad material. Those were delivered prices on the Atlantic Coast Line. That does not include the way points where we found them; that includes where we get the thing, at Richmond (Tes. p. 270) or wherever it is. It may be of interest in that connection to know that conditions as to wages for train crews operating log trains and other trains have been very materially changed between 1913 and 1930. Taking and assuming for the purpose of this statement that these logs were hauled in our freight train service, the over-time in 1913 for a ten hour run amounted to only $3.18, while in 1930, that over-time had gotten to $11.31 per trip. The straight time for the entire crew, conductor, flagman, brakeman, engineer and fireman had grown from $15.86 to $30.12, and the total wages of the crew including overtime had gotten from $19.04 to $41.43 per trip. That is an increase of 117.6%. Now, when this service is performed in local freight service there was no over-time in 1913. You will understand in 1918 under the Director General of Railroads there were tremendous burdens in the way of over-time regulations and increased wages that were ordered by the Railroad administrator. In local freight service there would be now an over-time allowance of $14.30. In straight time, that is, without overtime, the wages in 1913 for the crew were $18.92 per trip. In 1930 they had gone to $38.09 per trip. Combining the over-time at both periods with the straight time the train crew wages have increased from $18.92 to $52.39 per trip and that is an increase of 176.9%. Now taking into consideration the fact that when the Cummer scale of rates were originally established it was based on full train load movements made for that purpose only, and taking into consideration the fact that it has had to be extended under the requirement of the Florida Commission to apply indiscriminately, whether one car or 100, and thereby bringing about an increased cost of transportation, and taking into consideration the fact that the expenses of operation have grown

[fol. 1542] in accordance with the statements I have rendered or presented here, it seems to be perfectly apparent that a scale made in 1913 is no longer applicable to the Atlantic Coast Line as a revenue producer in 1930, or any of the years around 1930. When I say 1930 that embraces the period from January, 1930, through March.

"Court: This Cummer scale has application to all shippers of logs and not simply these two that the Atlantic Coast Line had a contract with? I mean one?"

"A. Any cars then issuing from these stations to their destinations, not to any one consignee, but it really had that effect, because no one else shipped to Mildale or Eastport but the Carpenter-O'Brien concern, and for that reason the Florida Commission applied it equally throughout the state. Yes, the Georgia Commission, making complaint about these shippers, that complaint was based on the disparity on the intrastate rate in Florida and the interstate rate. The complaint of the Georgia Commission before the Interstate Commerce Commission was against the level of interstate rates as compared with the level of rates within Florida. The intrastate rates in Georgia have never entered into this proceeding, except as a starting point for the whole trouble."

(Direct examination continued.)

After the Georgia Commission investigated this general level of rates in this state, it promulgated no tentative changes but ordinary changes in the rates that made them the same as if the Interstate Commerce Commission had made the interstate rates. After the Georgia Commission had promulgated Georgia rates on the level that the Interstate Commerce Commission had adopted, then the complaint of the Georgia shippers came in about the Florida [fol. 1543] rate, and thereupon in failing to get the Atlantic Coast Line to cancel the Cummer scale in Florida, the Georgia Commission then suspended any changes in the log rates in Georgia, that is, the intrastate rates. The changes which the Georgia Commission contemplated making in its intrastate rates were increases; the Georgia Commission finally promulgated the increased rates which it proposed to file, but suspended them, and they are continuing to be suspended. The existence of the Cummer

scale in Florida caused the suspension of the rates. I think there was some opposition made to putting into effect the higher rates by the Georgia Commission on the part of the Georgia shippers based on the Florida intrastate schedule. I think their complaint with the Georgia Commission was that you should not increase our rate in Georgia as long as the Florida shippers have a lower rate across the line. After the suspension of those rates in 1925, and in May, 1926, came the petition on the part of the Georgia Commission against the Florida rates to the Interstate Commerce Commission, out of which this case arose.

After the Carpenter-O'Brien Company, which had become the Brooks-Scanlon Corporation, had determined to move to the woods, and in effect surrendered this contract, then the Atlantic Coast Line Railroad came out openly and energetically to show the Cummer scale of rates was unremunerative and should be removed. It has taken that position ever since. I have testified that the Florida Commission opposed the rate structure because it applied to train loads and not to car load movements, and officially, that was the only ground in exhibit #15. So far as changes in the tariff was concerned it was on account of train-load [fol. 1544] movements, but in the conferences we had with the Florida Commission it was distinctly stated that the Florida Commission considered the rates as confiscatory. Yes, the Commission did say: "The Commission wishes it distinctly understood that this approval extends only to the method of stating rates in this tariff and not to the rates themselves, and that in their opinion they ran too low." It is correct that the Commission also said that to make such a scale of rates for the movement of logs in this State reduces the power of the Atlantic Coast Line Railway Company to make them just and reasonable rates to be charged on all classes of freight that the public could be interested in. Yes, they also said: The Commission regrets that you see fit to publish these low rates.

"Court: What is the date of that?"
"Mr. Alston: 1914."

"Q. Now, Mr. Perrin, please state from your knowledge of the situation and your experience as to whether the relationship between the cost of rendering service on this

rate structure had changed, and if so had the change been more or less favorable to the carrier rendering the service?"

"A. It has been very heavy and less favorable to the rendering of (Tes. p. 275) the service with any degree of profit or to a revenue equal to the expense of service."

Yes, it is true that a great deal of terminal service was rendered and is being rendered on these movements, bearing in mind that there was a terminal service, both in respect to train load and with respect to the varied movement over all the State in single car loads. We were not dealing with a train load, but dealing with a scale that applies on one car of logs or 100 cars of logs. My exhibit #11 in the former hearing showed the train load movements and [fol. 1545] the car load movements. Since Feb. 8, 1929, during the period of the operation of the Interstate Commerce scale of rates; that is from Feb. 8, 1929, to a date in March, 1931. After, or shortly after Feb. 8, 1929, the train load movements entirely ceased except as to the Wilson Cypress Company; and for quite a long period of time there was a train load movement only from the Wilson Cypress Company. During that two year period, if there was any other train load movement it was very small in volume. The trend and turn of the movement turned altogether on movement of cars in regular local freight train service, with the exception of the Wilson Cypress Company, which continued its movements until a more recent date. There is no difference on car load lots in the terminal service on this transportation service than any other transportation service. A very substantial service rendered in the same way if not to the same extent as in the case of a single car. Of course the saving in train loads is in the volume of the traffic assembled at one point rather than the various expenses of picking up cars at different stations and delivering them at different destinations. In this contract, wherein the Cummer scale was made, the shipper did save us some expense there at the origin, in switching; they have wood tracks leading out in the woods, and took cars out in the woods and brought them back loaded in trains and placed them on the track at which we would pick them up and carry them along. No, they didn't do anything at destination that we didn't usually do. They did their own switching in their own plants; that is true

of many large plants that have large operations. Of course they would have to have an expense of their own in assembling the logs, because it wouldn't be the obligation of the Railroad company to go in the woods at all, the railroad [fol. 1546] company operating only to and from its side track where the logs are delivered to the Railroad, but to the extent that the train is made up on the tracks, and then the expense of assembling the train, coupling up the cars and lining them up in the train, was saved under the train load feature. That was part of the contract, and they were to do that.

In the ordinary handling of car load traffic it is always the case that the shipper loads. These shippers took the cars out into the woods on their own tracks and brought them back loaded, and placed them on our track. If the shipper shipped in car load lots he would load the car on our tracks. In a sense that is all that these shippers did, except in a greater number of cars. I am not sure about the service we performed at Eastport when these trains were operating.

"Mr. Alston: That is the record and dealt with by the witness Keene at page 586 of this printed Docket, Vol. 2, and by witness T. W. Hansell, page 591."

The movement to the Wilson Cypress Company in the train load lot, when that train moves there is a substantial terminal service.

"Mr. Adair: Let me tell what it is. It has the usual terminal service that all traffic has with respect to the agency forces and with respect to the yard forces and it did not require picking up and placing of individual cars, but still it requires the placing of the cars for the use of the consignee."

(Mr. Perrin continuing:)

The relationship between the Georgia intrastate rates on logs which the Georgia Commission proposed to increase in 1925 and the Florida rate known as the Cummer scale rate is the same as between our Cummer Scale and our Interstate scale. The Georgia rate was identical, with the [fol. 1547] exception of one mileage group, with the scale as prescribed by the Interstate Commerce Commission. That was of course higher than the Cummer scale. I

couldn't say what was the percentage or approximate percentage by which the Georgia Commission was undertaking to increase its own rate and which increase was stopped.

"Q. You have been asked something about the short log rate, please state whether the Atlantic Coast Line Railroad understood the order of the Interstate Commerce Commission as passed on August 2, 1928, as deciding the rate on short logs as well?"

(Objection by Mr. Adair that it is improper to go into the realm of understanding.)

"A. The Atlantic Coast Line proceeded upon the passage of the Interstate Commerce Commission's order to apply the Interstate Scale as prescribed on both long length and short length logs. Then the Interstate Commerce Commission amended its order taking short logs out of it. (Tes. p. 280.) I think we found here this morning something like 50% is the approximate percentage of increase in short log rate over the Cummer scale rate. Yes, roughly speaking, a difference of about 2¢, where the short log rate is 6 the Cummer rate is about 4."

Recross examination.

By Mr. Adair:

There have been two horizontal increases in the Cummer scale since the date in 1914 when the Atlantic Coast Line Railroad established that scale of general application. Those increases were 25% each time; they were less than the horizontal increases in other freight rates generally because of the fact that 25% of the lowest rate in the coun- [fol. 1548] try produced a less amount of increase than on the higher rate.

"Q. You had 25% on everything, is it not?"
"A. The percentage was the same."

We got the identical percentage on the Cummer scale that we did on all other freight rates in the horizontal increases, and a subsequent 10% reduction. These two horizontal increases represent in a general way the principal increases in freight rates since 1914. This tremendous increase in the cost of train crews on train load movements and car load movements, these increases are applicable to

all classes of traffic. It is true that to offset these increases in operation since 1914, there have been substantial increases in the size of locomotives and efficiency of locomotives and efficiency of operation; the cost of transportation of a given amount of freight has been reduced in that way but unfortunately we have not the volume of it to overcome the increase of these other expenses. Since 1914 there has been a substantial decrease in the normal cost of transportation due to greater efficiency of operation, increase in the size of engines, etc., to the extent that these things would cause a reduction in expenses, but as a whole, and coupled up with those reductions the traffic amount of increase and other expenses, the result is a heavy increase in your expenses as a whole. I wouldn't say our unit cost is low in view of the tremendous expense we have in materials, wages, and taxes, making a great deal of expense. We have had two 25% increases in freight to overcome that, but that is very small as compared with the amount of increases in expenses. Yet, those increases are applicable to freight generally and not to logs particularly; all costs have gone up.

"Q. Mr. Perrin, were you, and when I say you, I mean [fol.1549] your railroad, when you made this Brooks-Scanlon contract and thus committed itself, as you say, to that rate, for Brooks-Scanlon in 1914 for the hauling of their billion feet of logs, your railroad had had nine years operating experience under that same rate with the Cummer people, hadn't they?"

"A. Our railroad?"

"Q. Yes."

"A. Yes, sir; although the movement had not been there."

"Q. There had been some movements during a substantial part of that time?"

"A. I wouldn't say that. I naturally assumed there was some log movements on the Jacksonville & Southwestern Railroad."

"Q. You acquired that railroad in 1904?"

"A. Yes, sir."

"Q. And you accepted their contract, the Cummer scale as applying from station to station, to Mildale was in effect when you acquired it?"

"A. Yes, sir."

"Q. And that rate was in effect for ten years before you published the rate that that Cummer scale be applicable generally?"

"A. Yes, sir."

"Q. So you had ten years operating experience to know whether you could make money hauling logs at that rate?"

"A. We had not had such experience as to cause us to sit down and figure whether we had made any money. We had not had the experience to cause us to make that test."

"Q. Your experience had not been so unfavorable as to cause you to make that test?"

"A. I said we didn't make it."

"Q. You sat down there after having had that rate in effect for ten years in this same general neighborhood about which we are making all of this row now, and you sat down [fol. 1550] with ten years experience and entered into the contract to haul a billion feet of logs?"

"A. Yes, sir."

This was bound to take several years, a number of years, but under conditions then that in solid train loads we would make some money out of it. And furthermore that ability to fix the maximum rate to be charged was lessened by the fact that on the greater part of the system we had already the Cummer scale. Yes, it had four or five years to run. And we entered into a contract that we knew it would take ten years to run; they could have gotten the extension of the Cummer scale just as readily as between them and shippers already using the Cummer scale. The contract was for the purpose of furthering the trainload movement and the operation of a special train every day in the week. We thought we could make money on it, and we may have. I wouldn't say that the cost of transportation of logs had increased more than the transportation of other commodities since 1914. (Tes. p. 285.) Yes, the rates on logs have increased approximately to the same extent that the rates on commodities generally have increased since 1914, but they started from such a low level. Our railroad made no complaint to anyone about the level of this scale, this Cummer scale rate, or about its operation until after this order of the Interstate Commerce Commision had actually been entered. Our railroad has made no complaint to the Florida Railroad Commission to this date asking that it de-

termine the reasonableness of the Cummer scale or determine whether some other rate intrastate should be imposed.

"Q. I believe you testified there was no quarrel between you and the Florida Railroad Commission until after this order of the Interstate Commerce Commision had been entered in regard to this Cummer scale?"

[fol. 1551] "A. I don't know that I testified to anything about a quarrel."

"Q. I mean you were not quarreling about the Cuminer scale or complaining about this level or asking anyone to let you end it until this Interstate Commerce Commission order had been entered?"

"A. We had this antagonistic hearing, the efforts of the Atlantic Coast Line and the Florida Commission, the Florida Commission appeared at the hearing and advocated the Cummer scale as a reasonable scale of rates and for that reason they were trying to establish as a reasonable scale a scale that would measure our Interstate rate."

"Q. Mr. Perrin, I read you from a statement made by the late Mr. Wells in the original proceeding at the top of page 629, Mr. Wells, then being Chairman of the Florida Railroad Commission: 'Now, the Commission does not take any position or will not take any position with reference to the changing or putting the Cummer scale into Georgia if they see fit. We have no objection whatever * * * etc.' (Reading statement.) Have you any recollection of that being said?"

"A. I remember very distinctly a statement made by the then Chairman, Wells, but the action on the part of the Florida Commission went beyond his statement, that you ought to show there was substantial profit in the scale and Mr. Wells testified that after this close study of the situation had been discussed at the hearing, Mr. Wells took the stand and stated after going into the matter they condemned the scale when he put it in in 1913 and they were not positive it was a reasonable scale."

I think the Florida Railroad Commission has always said that it was our remedy to immediately apply to the Commission, but it didn't mean anything to us. Yes they always said that. No, they have never been partisan in any case which we have applied to them in, but in this case they [fol. 1552] have been since 1926. In my opinion, they have

never shown any partisanship on any application, but we couldn't ask the Florida Commission to pass on this scale of rates when they are the main people in the advocacy of its continuance in all of this proceeding.

By Mr. Gutheim:

I would say the issuance of the bill of lading, the car having been loaded on the side track, the sending of engines to move the cars from the side track, to carry the car to a place for assembling in a train is what starts the Atlantic Coast Line Railroad Company in its performance of the origin terminal service on carload business, not the log business but ordinary carload business. That sidetrack may or may not be the private track of the shipper. It may be the public team track of the carrier. We know what particular car to place for loading because the agent or the shipper tells the agent what kind of a car he wants; yes, he specifies as to the type of the car, and sometimes as to the type of freight. It might be that due to the existence of what is known as freight service rules as between railroads we have some limits on the particular car that we might place so far as the ownership is concerned, but ordinarily our object is to place our home cars so as to get them in use. In placing foreign cars we are not altogether bound by car service rules between carriers. There is no restriction for any foreign car going out of that route in which it is found. If there are any number of cars they would select the foreign car of the point to which that shipment was to be delivered. If we had a car of cypress that was going to Memphis by the Nashville, Chattanooga & St. Louis Railway, and we had one of that railroad's cars in a reasonable distance from where it was to be loaded I would think that naturally they would put the Chattanooga & [fol. 1553] North Western car in preference to any other car that would be equally available. When we finally get the car of proper ownership and capacity to meet the requirements of a particular shipment, we find it in the yard and the switch engine moves it to the track where it is to be loaded. In a way he places it at a particular spot for the convenience of the shipper loading. After we have done that and the car is loaded what we do next is to issue the bill of lading and send off the car, switch it out for the purpose of assembling it; that is, we switch from the loading

track to our assembling yard. Then it is ready to go; that is we put it in a particular train. When we get that car to destination the service that we perform in order to deliver it is that the car would be delivered to the terminal track or on a private or assigned track. Yes, that would first involve the necessity of breaking up the train and putting the individual cars on individual tracks in our yard perparatory to moving to the place of unloading; all trains are broken up and cars placed according to their various places of delivery. (Tes. p. 290.)

After the train is broken up the switch engine service is the service necessary for placing the car for unloading. Yes, that involves us in the necessity of spotting the car at the particular point that suits the consignee's convenience.

Now taking the movement of cars by train load, the empties that we furnish for loading all stay together; they are kept together. Yes, we puii them from the place where they were made empty out to the woods; and they stay together. After we get to the woods the shipper takes them and carries them to the woods; before that we place them on that track, and then he does the rest, so far as taking [fol. 1554] them to the loading place is concerned and bringing them back loaded, and then he delivers them to us on a train load. Yes, then we go forward with our engine and transport them to destination. The operation at destination is to place the cars at a point where they can take them into the yard if they perform their own service. The large volume of log business on the Atlantic Coast Line not on the Cummer scale that is handled jointly with other railroads, all that goes into adjoining states, of course, involves accounting with connecting lines. Yes, also it involves a terminal switch at the point of interchange.

"Q. Then you do not have a Cummer scale?"

"A. Yes, sir; that is the penalty for providing our rates."

Redirect examination.

By Mr. Alston:

Yes, I testified that the rates which are known as the Cummer scale of rates apply not only to train load movement but to car load movement. Yes, they apply to car load movement in requiring all of the spotting and all of the other things that I have described.

Taking this contract of the 26th of Jan. 1914, which is found on page 261 of the Supreme Court Record, under that the lumber company proposed to build a spur track into the woods on its own account, and the railroad company covenants that it will at its own cost and expense construct and maintain a side track or tracks of sufficient lengths to accomplish the convenient storage and interchange of loaded and empty cars that shall be designated by the lumber company. Yes, there was the maintenance of this facility of side track undergone with the lumber company. Yes, it would be done at its own cost and expense. The usual arrangement is to construct a turn-out [fol. 1555] for the engine, and all of the remainder of the work is done at the expense of the shipper. Yes, the railroad company obligated itself that it would from time to time as the necessities of the lumber company may require, take up and move any of the said sidings from the point where it was originally located to such other points as shall be designated by the lumber company as necessary for its purpose. That is very unusual.

"Q. The railroad further agrees that it will construct and maintain at its own cost and expense, the necessary switches at such points on said siding as shall be designated by the Railroad Company, and will extend the rails leading from said switch to the edge of its right of way, and will thereafter permit the Lumber Company, at its own cost and expense, to connect with said rails the rails of its spur track by placing cars upon said side track to be built by the Railroad Company as aforesaid. It is agreed, however, that if the construction of said track, the Railroad Company finds it necessary to use or occupy land belonging to other parties, that the Lumber Company will, and it hereby agrees to obtain and furnish to the Railroad Company, the necessary rights of way, for the construction, maintenance and operation thereof. I don't know whether that means what it says."

"A. It means there the Lumber Company."

"Q. 'The railroad company further agrees that it will furnish for the service contemplated by this contract a sufficient number of cars, to enable the Lumber Company to load and ship a minimum of thirty (30) cars per day, or sixty (60) cars every other day (except S[illegible]lays and Legal holidays) during the life of this agreement, and that it

will furnish, in addition to said cars, an engine and neces-
[fol. 1556] sary crew to move same; and that it will de-
liver said cars upon said side track at the rate of thirty
(30) cars per day, or sixty (60) cars every alternate day.'
Now you have been asked about placing cars and spotting
cars, isn't this spotting and placing about which you have
been asked the same as placing cars on a side track?"

"A. In a way it is, but that is confined to one car and there confined to a bunch of cars.

Yes, in this agreement we have agreed to put same along the side tracks as the Lumber Company might want and move as often as they find necessary. And with the single shipment we were to put them where they pleased and where the consignee ordered it the same as we would any other business.

"Q. Now, 'the Railroad Company further agrees that when said cars shall have been placed by it upon the side track aforesaid, the Lumber Company shall have, and is hereby granted the right to take the same and move them under its own power, and manned by its own crews, on the spur tracks and into the woods for loading, to be returned by said Lumber Company to said side track.' Now, do you loan cars to shippers to be taken off into the woods—I mean any other class of shippers?"

"A. Not that I recall."

"Q. Now, 'upon return of said cars under load with logs as aforesaid, the Railroad Company agrees that it will accept delivery of the train made up of said cars on said side track, and that it will move the said train from said side track over its lines to the plant of the Lumber Company at Cedar Creek, near Jacksonville, Florida, at the rate of thirty (30) cars per day, or sixty (60) cars every alternate day (Sundays and legal holidays excepted) as the Lumber Company (Tes. p. 295) shall elect, and from time to time designate. Upon arrival at the plant of the said Lumber [fol. 1557] Company at Cedar Creek, the Railroad Company agrees that it will place said train into a track or tracks to be furnished by the Lumber Company.' Isn't that what you do for an ordinary shipper from whom you receive a car?"

"A. Yes, sir."

I am guessing that Cedar Creek is about six miles from Jacksonville. This lumber didn't go to Jacksonville; it

left the line at the outer section of Jacksonville and went directly to Cedar Creek.' My recollection is that the Atlantic Coast Line had to build six miles of the line to make that; some over waterways and we had to build a bridge too. We have not built a line and bridge for other people that way at our own expense that I know of. The Lumber Company was then to unload the train of cars. Yes, every other shipper would do the same thing, unload all car loads of freights. The Lumber Company had the privilege of unloading within 48 hours. These lumber cars in this train went back empty. They were not necessarily especially constructed to bring logs from the woods, but they were under the train operation that we kept together for that special movement and carried back coupled in one bunch and all empty. Yes, the movements back of the cars were always empties; and the train itself was nearly always entirely empty, going back. It is correct that we provided a movement in this service from the woods one way and we had to make the next way entirely without any compensation at all. Where there is a train operation, that is, as conditions have developed in the last few years, the operation of the train, special trains, have become limited. At this time we have no log train operation or any train operations at all.

I think it is unquestionably true that instead of performing less service, instead of the railroad performing less [fol. 1558] service for this company, for these lumber shipments of logs under this contract than it performed for the general public, it performed a great deal more service for them, including the return of the cars empty. The Florida Railroad Commission has not ordered this rate known as the Cummer scale rate into effect on any other railroad in Florida that I know of.

"Q. You have testified either in this hearing or in previous hearings and now in the record before the court, as to the rate on the Seaboard Air Line, and as to the rates on the Georgia Southern & Florida Railroad, and the rates on some other roads in Florida, as to the transportation of logs, and those rates as will be seen from your testimony are substantially higher than the Cummer scale rate. Please say whether or not there was any transportation difference so far as those roads were concerned and as to which a rate applicable on the Atlantic Coast Line or rather

reasonable on the Atlantic Coast Line would not be reasonable over the other lines."

"A. The conditions on lines in Florida like the Seaboard Air Line and Atlantic Coast Line are so nearly the same that it will be almost impossible, or it would be impossible to justify a difference of rates as far as reasonableness is concerned."

(Motion by Mr. Adair to strike the question on ground that the witness is not qualified to answer.)

The rates for intrastate transportation over the Atlantic Coast Line in Florida and over the Seaboard Air Line in Florida as for other commodities for like distances and under similar circumstances are the same. Yes, every rate except the log rate in Florida as prescribed by the Florida Commission have been prescribed at the same time for the Seaboard and the Southern. There is no difference in [fol. 1559] other rates that have been made by the carriers themselves except on these logs. The Seaboard may have point to point rates on other commodities other than logs different from the Atlantic Coast Line rates, I don't know. No, I have not heard testimony to the effect that they have in this very proceeding. The only testimony we have had about the Seaboard Air Line is with the Cummer Cypress Company, and that record is clear, that is the trackage arrangement. No, I don't think I would go so far as to testify positively that the Seaboard Air Line has not got several if not many point to point log rates in Florida which are substantially less than the Seaboard Air Line rates to which I have referred. I do know that the body of rates on Seaboard Air Line and Atlantic Coast Line are the same whether made by the Florida Commission or the roads themselves. I mean the total general rates. Seaboard Air Line Railroad may have the lower rate at certain points due to water competition but that does not effect my statement where there is no water competition that the rate is different on these two roads.

By Mr. Gutheim:

If the Atlantic Coast Line establishes a new station in the requirements of the business for the handling of carload traffic in and out we do customarily build a public track to accommodate that traffic. If the station were such

a station as would call for carload shipment. If a station of that sort were entirely abandoned we would be privileged to pull up that track if it were economical or if we saw fit to do so. (Tes. p. 300.)

This six-mile branch that I spoke of did prevent the necessity of carrying traffic through Jacksonville, it had that effect, but I don't think that was the reason for the [fol. 1560] construction. Yes, we handled a great many thousands of tons of freight revenue, of logs, over that track, before it was abandoned. Yes, it was a branch that handled a very considerable tonnage of revenue producing business, under the Cummer scale. Substantially for this one customer. Yes it was a substantially good sum for the Atlantic Coast Line nevertheless. This 48 hour notice of car time that is allowed in connection with our terminal service, that is a normal freight service rule; yes, not only on the Atlantic Coast Line but practically everywhere in the United States. I would think that there are usually more empty moving coal cars than box cars; balancing the loaded movement I think it is wrong to say that there are more frequently empty coal cars than in the case of box cars. In our own situation it would be a return empty of the coal car where it comes in loaded. But in the case of box cars where we handled a loaded car we usually get back three loads for each empty that we bring back. Taking coal cars loaded from the mines, it is true that we have very little return movement loaded for the empty cars. For our ordinary box car movement, we would have a better balance of loads in both directions taking into consideration all traffic in either direction. Taking tank cars for instance we have a similar movement, almost 100%, in the case of tank cars. I think it would be true in a general way that the more special the type of car the greater percentage of empty movement. I think, however, that you would have to consider the situation, what traffic it is to move and where it is to be moved from and where it is to be moved to.

By Mr. Adair:

"Q. Mr. Perrin, you testified upon your last examination by Mr. Alston with respect to the duty of the Railroad Company to build this long track and these bridges across one of the creeks that in order to reach Eastport, the

[fol. 1561] Brooks-Scanlon place of business, formerly the Carpenter-O'Brien Company, that was the same contract in which you undertook to furnish the Cummer scale?"

"A. I think you have in mind a different question. It isn't in the contract at all, that was not in the contract as to the movement of these logs, it was incident to the movement of these logs that the track was built."

We did spend a large sum of money in building that line. I don't know how much money it cost. I don't know whether it was quite a large sum. Yes, that was all a part of the same transaction in which we undertook to transport this one billion feet of log. Yes, it was incident to the movement of the logs. I do not know what the spender had in mind as to whether he thought it was good business to get that one billion feet of log business at that time for our railroad to be willing to spend all of that money; I know he spent it.

"Q. Now, I want to ask you Mr. Perrin, Mr. Alston indicated an opinion in which I understood you to concur, that you furnished to the shippers of logs in train loads more services than you furnished to the shippers of logs in car loads. Did I under your correctly in that?"

"A. I think this, there is more service in always carrying the cars back empty than there is in carrying single cars of logs where there is an occasion for loading that same car with something else or where there is a car available for further loading at the point of origin where you don't have to carry the empty back."

"Q. Now, will it cost the Railroad Company more in proportion to operate this log train service than it did to handle the single car load of logs?"

[fol. 1562] "A. Well, it would cost more to handle one train, of course, than to handle one car."

"Q. I mean more per car to handle the train?"

"A. Yes, sir; it would be more per car."

"Q. Than to handle this train load?"

"A. Yes, sir; undoubtedly."

"Q. Then the financial outcome for the railroad on a given number of cars in the shuttle train loads, train load movements, was better on a given number of cars than the outcome of the Atlantic Coast Line Railroad on the same number of cars handled single car lots?"

"A. I think that is correct."

"Q. Your view then is the same as it was in 1927 when you testified in this case that the cost of handling a given amount of logs in a train load is less than a single car and less than a small number of cars in a regular train?"

"A. Yes, sir."

"Q. As a matter of fact when this engine was hitched on to the cars, to one end of that log train, and the caboose on the other end of the log train, and it lit out for Jacksonville, that engineer didn't have to stop to get out of the way of anything on the track?"

"A. Unless he had some trouble; they frequently have that."

"Q. Then in going back with the empties when he hooked the engine to one end and the caboose on the other he didn't have to stop to get out of the way of something unless he had some trouble?"

"A. That is right."

Redirect examination.

By Mr. Alston:

The rates for handling coal, handling oil and for handling other things in this special class are tremendously [fol. 1563] more than the Cummer scale. The return empties in this log movement under the Cummer scale was greater in percentage than any other class of traffic known to the railroad. The return of empties in a log train is 100%; the return of tank cars is 100%; and coal cars almost 100%. I would say that those three classes of traffic represent the greatest return in percentage of empties. Yes, of those three classes of traffic the log rate under the Cummr scale is very much the smallest.

By Mr. Adair:

"Q. Would the Atlantic Coast Line net out-turn be better or lower in handling 100 cars of logs under the Cummer scale than any other scale in train loads, including the return movement, than it would be if it hauled 100 single car loads of logs without the so-called 100% return movement?"

"A. Well, unquestionably there is more net revenue in the handling of 100 cars of freight in a solid train than in

handling 100 cars by individual cars, assuming that the same rate would apply."

"Q. And that is true even though you return your empties in a solid train, 100% empty?"

"A. Yes, sir. The fact about it is that the percentage of empties is greater in the train load, the expense of handling the empties is more than in the case of the 100 cars by the single car load, but the earnings from the operating of the log train, taking that into consideration, the final result, there is more net return in handling them in the train load. That is correct.

(Witness excused.)

[fol. 1564] Mr. GEORGE W. LAMB, sworn by the defendant, testified as follows:

Direct examination.

By Mr. Alston:

I live in Wilmington, North Carolina; I am general auditor of the Atlantic Coast Line Railroad. I am in charge of accounts of the Atlantic Coast Line Railroad. Those accounts include the balances and the accounting records showing the operating receipts of revenue and expenses and revenue from other sources and all the expenses of the company. They involve the records for the entire operations of the Atlantic Coast Line Railroad Company in every respect. That includes the tax records and all the capacity expenditures such as fixtures, etc. These accounts include all of the operating expenses and the other elements necessary to develop the costs from which can be developed costs or the approximate costs of any one commodity. I have been connected with the railroads and their interests since October, 1900, when I entered the services of the Louisville & Nashville Railroad Company and held various clerkships in the Louisville & Nashville Railroad, among others being the position of second assistant comptroller and assistant comptroller. On March 1st, 1918, I was appointed staff officer in charge of accounts for railroad administration with headquarters in Atlanta under Deputy

Director Martin of the Southern group. I remained there for two years and on March 1st, 1920, returned to the Louisville & Nashville at Louisville as Senior Assistant Comptroller. On March 1st, 1921, I was appointed General Auditor for the Association of Railway Executives and I moved to New York to organize a force to check the accounts of the American Railway Express Company, for all the railroads in the country having offices in New York, Chicago, Philadelphia and Chattanooga. On June 1st, 1931, [fol. 1565] I resigned that and accepted the position as general auditor for the Atlantic Coast Line Railroad Company, which position I now hold. I have held that position continuously since. I have prepared a statement showing the property investment and operating income account of the Atlantic Coast Line Railroad Company for the calendar year 1922 and for the years 1926 to 1931, inclusive.

(General objection by Mr. Adair to this line of testimony on the ground that it is immaterial and irrelevant and can have no bearing upon the right of carrier or the claimants, or any of them, to restitution.)

The information contained on that statement, which I will later present, is drawn from the books and records of the Atlantic Coast Line Railroad Company immediately under my personal supervision and jurisdiction. The calculations that are included on here were made by me personally. The figures were drawn directly from the records of the company in calculations as to percentages increase or decrease, percentages of return on investment. They were made by me personally. I offer that as the Lamb Exhibit No. 1. My exhibit No. 1 which I now file is a statement of the Atlantic Coast Line Railroad Company, showing the property investment and operating income account for the calendar year 1922 and for the years 1926 to 1932 inclusive. Line 2 is the investment in road and equipment and it will be noted that the increase for 1931 over 1922 was $72,226,621 and 1931 over 1926 was $16,173,709. I would like to direct your attention to line 9, total operating revenues. You will note in 1922 the total operating revenue of the Atlantic Coast Line system was $70,823,345; in 1926 the total operating revence was $97,086,517. Now, follow that line across to 1931 and it will be noted that the total operations were $54,088,005. The decrease from 1931 as compared to 1922 was $16,735,340, or 23.63%. The decrease as

compared with 1926, that is 1931 under 1926 was $42,998,-512 or 44.29%. Operating revenue represents the money collected from the transportation of freight and other inci- [fol. 1566] dental operating revenue and operating income money represent other items. There might be other income in there not represented in the freight charges collected. (P. 310.) When I say freight, that means all operating income. It includes freight and passengers either. The freight fares collected, or rather, passenger fares collected and freight charges collected or switching charges and things of that nature. Total operating revenue means all of the gross receipts received by the railroad company from its regular railroad operation, whether it be freight, passenger or otherwise. Now, take in 1931 as an illustration. The $54,088,005 shown on line 9, include the freight, mail, passenger, express and all other revenue that is listed from line 9 to 14. On line 29 I have net railway operating income. That is the figure remaining after you have deducted from your gross operating revenue your railway tax accruals. Uncollectible railway revenue, your hire of equipment and net balance. In other words the line 29 is the figure designated by the Commission and under the transportation Act as representing the return which a carrier receives on its investment. Now let's refer to that line 29. You will note in 1922 the figure $14,416,368 of net railway operating income. In 1926 it was $17,585,807. Now, following that line across to 1931, where it will be noted that the net railway operating income of the Atlantic Coast Line Railroad was $4,748,109 or a decrease as compared with 1922 of $9,668,259, or 67.07%. The decrease as compared with 1926 was $12,837,698 or .73%. I think it is a correct statement that the word revenue applied in railroad language means gross receipts, while income was intended to express net. I direct your attention to the last line 33, return on investment. In 1922 it is 5.88%; in 1926 6.11% and in 1927 it dropped to 3.39%; in 1926 3.26% and [fol. 1567] in 1929 it rose to 4.20%; in 1930 2.37% and in 1931 was 1.37%. The last figures available are for March and for the three months from January 1st to March 31st, 1932. After taking fixed charges we have a deficit of $119,-542.44. In other words, we failed to earn our fixed charges by approximately $120,000.00.

Motion to strike out this testimony by Mr. Adair.

Those figures shown on this Exhibit No. 1 are correct. I offer this paper as Lamb's Exhibit No. 1.

Objection by Mr. Adair.

Mr. Guthiem: In view of the fact that Mr. Lamb has stated that he made those figures himself, made those compilations, may I ask him with respect to line 2, the third item from the right, percentage of increase or decrease, that is, ...crease of 1931 over 1922.

The exhibit shows under the column of percentage of increase or decrease 3.37%.

That is a typographical error, in pointing out. It is a typographical error because the original exhibit had it differently and you can readily see that ten per cent say of $214,000,000 would be around $21,000,000 and three times that would be $63,000,000 and so this figure should be [fol. 1568] 33.7%. In the same way an exhibit showing the property investment and operating income account of the Atlantic Coast Line Railway Company in the State of Florida. That sheet is prepared in the same way in which Exhibit No. 1 was prepared. I would like to draw your attention to the note at the bottom of the page which reads, "The investment used on line 2 of the Exhibit is based on the tentative valuation of Atlantic Coast Line Railroad Company properties in the State of Florida, as of July 1st, 1917, as found by the Interstate Commerce Commission, Valuation Section, to which has been added the actual expenditures for additions and betterments subsequent thereto, as made in each year." It should be understood that the valuation figures shown on this exhibit as having been found by the Commission are not accepted by the Atlantic Coast Line Railroad as representing the fair present valuations which are deemed by the Atlantic Coast Line Railroad to be in excess of the figures shown on this exhibit. Throughout this exhibit the figure or letter R often appears after a figure. That means red figure, which means with a deficit or decrease instead of an increase.

Objection by Mr. Adair to the witness testifying to this exhibit before it is offered in evidence.

The same vouchers, same records and some books which were used in making up my Exhibit No. 1 were used or rather a part of them were used in making this exhibit which I am now discussing. The only difference between

the two exhibits being that the figures on Exhibit No. 2 reflects the results in the State of Florida. I offer this paper as Lamb's Exhibit No. 2.

[fol. 1569] Objection by Mr. Adair on the ground that the data is immaterial and irrelevant and that it is not the best evidence but a mere compilation from the books of original entry. That the witness has not shown that he is qualified to testify with respect to the matters involved therein, and that it has nothing to do with this period of restitution.

Mr. Alston: We would like to state in the record here, Your Honor, if our brethren desire, that this hearing be adjourned to Wilmington, N. C., after this witness has testified, where we can be in the presence of the records and vouchers of the Atlantic Coast Line Railroad Company from which these (p. 315 of testimony) figures are taken and in order that they may have such convenient access to them if they may desire.

(Mr. Lamb continuing:) The figures shown on this Exhibit 2 are correct to the best of my knowledge and belief. They have been prepared by me with great care. Exhibit No. I is a very simple exhibit to prepare. It is merely dealing with the figures from our records and making the deductions and working the calculations and can be prepared in less than a day. The second exhibit is also drawn from the vouchers and the compilations necessary to prepare it can also be prepared in less than a day. The other exhibits that I have prepared require a considerable amount of time. Of course, I worked up a great deal of basic figures which were presented at the previous hearing before the Commission and in bringing those up to date for this hearing it did not require as much effort as it did originally. I testified on this subject before the Interstate Commerce Commission or Examiners in May or June, 1931 in Jacksonville [fol. 1570] and then in Washington in July. Taking all of these exhibits which I am going to tender in this case, my personal time on them, originally and subsequently, probably required over two months constant effort. For the last month in reviewing these statements I have devoted I should say, three weeks of my time to this case, the requirement in connection with certain studies and supervising the labor of various clerks in our auditing disbursement office. There were several months devoted to certain figures that I will later present and on others it required the efforts of

the auditing disbursement office for a number of months to develop their figures. All of these figures that I am offering were under review by me during all of that time in the various phases of my investigation. I ought to explain to the Court for its information that the Atlantic Coast Line currently does not make a separation of operating expenses for each of the states through which it operates but the requirements of the Railroad Commission are that we report operating expenses to states. We therefore adopted a simple method of assigning the expenses to the state on an operating revenue basis applying the revenue accruing; the percentage of the revenue accruing in each state to the total operating expense. Now, they are necessarily assuming that the cost of earning a dollar of revenue in each of the states is the same. In other words, it costs no more to earn a dollar of revenue in Florida than it costs on the balance of the system. I think I can demonstrate the fallacy of that assumption because it costs more to operate in Florida than it does on the balance of the system. I might [fol. 1571] illustrate that in this way. The state of Florida is an originating and terminal state, that is to say, as to through freight that originates in Florida or terminates in Florida for interstate traffic, it must have one terminal and it is necessary on intrastate traffic to have two terminals. Now, there is no very heavy traffic in Florida for interstate business necessarily because of the peninsular shape of Florida. Let me illustrate my point in this way. Let's take a shipment that originates in Florida. There is terminal originating expense in Florida, and if that is destined to the East, we will say to New York for illustration purposes, that shipment would move through Georgia, South Carolina, North Carolina and Virginia and would be turned over to our connection at Richmond without any terminal delivery expense on the part of the Atlantic Coast Line Railroad, the terminal delivery expense being on the destination carrier in New York. If we have a shipment coming from the East originating in New York, the original terminal expense would be borne by the carrier originating that shipment and it would be turned over to us at Richmond without such expense and hauled through Virginia, North Carolina, South Carolina and Georgia without any terminal expense in a delivery sense but would have when reaching Florida a delivery terminal expense. That is, for any interstate traffic to and from Florida received from and

delivered to other connections. That illustrates in a measure one of the reasons why Florida operations are more costly than on the balance of the system. Now, the question will probably be raised as to the apportionment of revenue to Florida. I might say that the method of distributing of revenue is to take the amount collected from each shipment and prorate that to the various states through which [fol. 1572] it goes on a mileage basis based on tariff charges. Now, it is practically and sometimes maybe impossible for us to determine in the accounting department the history or construction of each rate and therefore, we must adopt the tariff rates between given points in making our distribution as between states. Now, as Mr. Perrin testified on yesterday and it will no doubt be brought out by opposition, the very nature of the cost of operation in Florida provides what they term an arbitrary of approximately 15% as between the lines south of Jacksonville to River Junction. Now, if we could absolutely determine the history of each rate and know the proportion of arbitrary in each rate, we would first assign that 15% to Florida, that is, south of Jacksonville and then apportion the balance on a mileage basis as it was considered we had not credited enough revenue to Florida by not giving them specific assignment of the 15%. As I previously explained, we assigned expenses to Florida on the revenue basis and therefore, it is axiomatic if we assign too little revenue to Florida we have in comparison assigned too little expense. Illustrating in this way, if our operating ratio happened to be eighty dollars that is, the cost is eighty dollars to earn one hundred dollars of revenue, so that for every one hundred dollars of revenue we would credit to Florida by reason of this 15% arbitrary, we would also debit Florida with eighty dollars, so the difference would be only twenty dollars net. Now, there is another feature I want to draw your attention to, and that is the service performed by the balance of the Atlantic Coast Line system for the benefit of Florida for which there is no compensating service per- [fol. 1573] formed by Florida. Let me illustrate in this way. Coal used on locomotives used in Florida is purchased by the Atlantic Coast Line Railroad either from the Alabama fields or Virginia or West Virginia. Now the coal is handled over the system all the way from these fields to the Florida state line by the balance of the Atlantic Coast Line system without any compensation. In other

words, we charge Florida the cost of that coal at the delivery point only adding to it the freight on foreign lines, which we do on the balance of the system but we do not add any freight or cost of hauling it over the balance of the Atlantic Coast Line system to the Florida state line. The same is true of rail and other materials and supplies used and maintenance, etc. Now, there is nothing originating in Florida for use on the balance of the system that would compensate this big service performed for which we do not make any charges. If we assigned expenses to states we would make a charge to Florida for that service. Our cost accruing as I present in these exhibits, is more favorable to Florida than a strictly cost accounting would justify where we assign the expenses on an operating basis, and I am trying to explain where we have benefited Florida rather than injured her. Now, let me go back to this exhibit and refer to line 9. In 1922 the gross operating revenues were $17,851,388.48. In 1926 they were $30,330,194.04; in 1931 they had dropped below 1922, or $14,404,883.50, a decrease from 1922 of $3,446,504.98, or 19.31%. In 1931 as compared with 1926, a decrease of $15,925,310.54 or 52.51%. [fol. 1574] The decrease in freight in 1931 as compared with 1926 being 49.06%, and a decrease in passenger revenue of 75.43%. Those last two figures are found in lines 10 and 11. Now, let me call your attention to line 29, the net railway operating income. In 1922 the net railway operating income for the Atlantic Coast Line in Florida was $3,307,632.45; in 1926 $5,151,326.78; in 1931 it had dropped to $829,813.35, a decrease as compared with 1922 of $2,377,819.10, or 74.13% and a decreased amount compared with 1926 of $4,321,513.43 or 83.89%. The bottom line shows the return on investment in road and equipment and in 1922 it was 4.31%; 1926 it was 5.41%; 1927 it was 2.28%; 1928 being 1.85%; 1929 being 2.43%; 1930 being 1.17% and in 1931 had dropped to .82 of one per cent. In these lines 32 and 33, the wording, "Incl. M & S" means material and supply. Those figures are shown on lines 3 and 5, line 3 is material and supplies. The other is cash. That includes material and supplies. Now, let's go back for a moment to the question of this arbitrary assignment of revenue. In other words, our failure to assign 15% arbitrary to Florida in 1930. The total interstate freight revenue in Florida was $7,108,188. Now, just for the sake

of illustrating the insignificance of the point, let's assume that 75% of the total interstate revenue——

(Mr. Lamb's last statement struck from record.)

I have prepared a statement which I will file as Lamb's Exhibit No. 3, showing the traffic density statistics of the State of Florida compared with the system and the system excluding Florida, for the calendar years 1921 to 1930, [fol. 1575] inclusive. I offer this as Lamb's Exhibit No. 3.

(Objection by Mr. Adair.)

The second sheet of the exhibit shows similar information for the Seaboard Air Line Railroad. Now, let's take 1929. If you will notice column 4, opposite 1929, average miles operated in the State of Florida were 2,055.4. That is by the Atlantic Coast Line as shown on sheet 1. If you will refer to line 10 you will find the average miles for the system, excluding Florida, as 3,096.2, and the percentage of the Florida miles operated to system, excluding Florida, is shown under column 13, opposite 29 as 66.4. The next column shows that the percentage of Florida ton miles to system, excluding Florida, column 15, was only 50.4. In other words, as shown by column 6, tons one mile per mile of road in the State of Florida, we have 400,002, and as shown by column 12, tons one mile per mile of road for the system, excluding Florida, 794,395, which represents approximately 50%. Now, taking the average for the first five years the percentage of Florida mileage to the operating mileage of the system, excluding Florida, as shown under column 13 was 60.2 and the percentage of Florida ton miles to system, excluding Florida, 37, and percentage of tons one mile per mile of road, Florida to system, excluding Florida, 61.4. That is the average for the five years 1921 through 1925. From 1926 to 1930 it shows that with 64.9 of the mileage in Florida operated to system, excluding Florida, and percentage of Florida ton miles to system, excluding Florida, 41.5 and percentage of tons one mile [fol. 1576] per mile of road Florida to system, excluding Florida, were only 63.9 of the system. Now, I presume the opposition may say we should use, not the mileage, the operating mileage, but the operating mileage per two track. Now, if we do that, taking the first five years, the 6% would be 54.2 of the mileage for the system, excluding Florida, and percentage of per ton miles for the system, excluding

Florida, would be 36.4 and the percentage of tons one mile per mile of road to system, excluding Florida, 67.3. That is the miles of road operated. I mean as to two track. That was taken from Mr. Pettyjohn's exhibit in the previous case. The average from 1926 to 1930, would show, including two track as 58.4. The percentage of miles to the system, excluding Florida, 40.4, and the percentage of tons one mile per mile of road to system, excluding Florida, 59.6. Mr. Pettyjohn is accountant for the Florida Railroad Commission. The traffic density in Florida does not equal the traffic density in the balance of the system. On the contrary, the figures I have given indicate that the Florida density is considerably less than the balance of the system and explains in part the reason for the cost of operation being higher relatively than on the balance of the system.

Q. Now, for instance, in 1929, as I understand line 13 of the first page of this exhibit 3, or rather column 13, the percentage of miles of Atlantic Coast Line Company to the system, excluding the Florida line.

A. That was Florida mileage. It was 66.4% in 1929, or the percentage of Florida ton miles to the system, excluding [fol. 1577] Florida, was only 33.4%, or about one half, and the percentage of tons one mile per mile of road in Florida to the Atlantic Coast Line system, excluding Florida, for that period was 50.4. In other words, the density of traffic was practically one half of the system and where you state one half the 33.4% is only one third of the system. The Atlantic Coast Line Company's experience is very similar to that of the Seaboard Air Line Railroad. The same identical information is shown on the two papers.

Q. Then, how many miles did the Seaboard Air Line Railroad operate in Florida during those periods?

A. Well, in 1930 1824.94 is the average of the Atlantic Coast Line Railroad as shown under column 4, and the mileage of the Seaboard Air Line was 4495.12, and the system mileage, exclusive of Florida, as shown by column 10 was 2670.49. (P. 325 of testimony.) I have made an attempt to develop whether or not the cost of operation in Florida was higher than on other parts of the Atlantic Coast Line system, and from this study it would appear that the cost per unit in Florida on the third division is considerably higher than that on the balance of the system. I base this statement for one of the reasons on the study

made of out of pocket expenses in the State of Florida. For the information of the Court I will say that out of pocket expenses are those expenses which we can absolutely assign without question to the freight service and term them out of pocket and they are absolutely out of pocket expenses. They represent account 392 train engine men, 394 fuel for train locomotives, 397 water for train loco- [fol. 1578] motives, 398 lubricants for train locomotives, 399 road locomotive supplies, and 400 engine house expenses, train; 401 trainmen; 402 train supplies and expenses. I have taken these numbers from the classification of accounts of the Interstate Commerce Commission. They are the accounts to which these expenses are charged in our regular classification and disbursement of operating expenses, as prescribed by the Interstate Commerce Commission and are uniformly charged throughout the country. The third division of the Atlantic Coast Line operates entirely within the State of Florida. In other words, it constitutes 94% of the total mileage of the Atlantic Coast Line in the State of Florida. The second division operates 126 miles in Florida and that runs from there up to Rocky Mount and the first division operates up to Richmond, but the third division is 100% in the State of Florida. Now, in order to ascertain out of pocket expenses, add our vouchers and payrolls and material and supplies issued, analyzed for twelve months from June 30, 1928, to June 30, 1929, for assignment specifically to the third division and to the 1st and second divisions, because our accounts are not ordinarily so segregated. We made this test to draw out every figure that went into this out of pocket expense which I have just listed. Every voucher, every payroll and every item of any nature that went to those accounts was completely analyzed and a separation made as between the third division and the first and second division. As a result of that test we developed that the cost per loaded and empty freight car mile on the third division was 2.95 cents and on the first and second divisions 1.72 cents. In other words, the cost on the third division is 171.86% of the cost [fol. 1579] on the first and second divisions. I found that the cost per gross ton mile per thousand on the third division was 88.288 and on the first and second division was 53.263, or that the third division cost per thousand gross ton miles, that is, in Florida was 155.62%. Now, I think this shows some rather conclusive evidence of the higher

cost of operation in the State of Florida than on the balance of the system.

(Motion by Mr. Adair to strike all of the testimony of the witness.)

I have prepared an exhibit showing the operating expenses of the Atlantic Coast Line Railroad Company assigned to the State of Florida on (a) system operating ratio and (b) on the Oklahoma Formula, for the six months from January 1st to June 30th, inclusive, 1931. I will file this as my exhibit No. 4.

Objection by Mr. Adair on the grounds specified in his objection to Lamb's Exhibit No. 2, and that this formula purports to cover only a small part of the restitution period.

As I previously explained to the Court, we do not currently make a separation of our operation expenses according to states and we use the operating revenue basis in the assignment of expenses. We have always felt that in adopting that method, we were undercharging the State of Florida, because of the conditions, the density of traffic and other conditions indicating that the cost in Florida was greater than the average cost on the system, and in order to determine it definitely, we commence with our accounts of January 1, 1931, and continued to June 30, 1931, inclu- [fol. 1580] sive. We made a separation of our operating expenses to states under the principles of the Oklahoma Formula. Now, no formula that has ever been devised would be 100% accurate but the Oklahoma Formula, as we studied the cost, as you will find in case 222 Fed. 539, where the Oklahoma rate was decided by Judge F. A. Euman, on March 12, 1918. I have not the reference to it as the report was so voluminous that it was never reported in the Federal Reporter. It is an Oklahoma case.

Objection by Mr. Adair.
Latter reference stricken from record.

In this exhibit the first column of figures is headed operating ratio system, the second, Oklahoma Formula and the third, Oklahoma basis over system operating ratio basis. It will be noted from the total line at the bottom of the statement that Oklahoma basis is 878,139.53 (p. 330 of testimony). Now, this is expenses to Florida for the six months

period from January 1st to June 30, 1931, inclusive, or 13.26%. There is an increase in ratio expenses for Florida in the maintenance of way and structures of 24.73% and in the traffic gross there is an increase in traffic gross of 11.28% and an increase in miscellaneous of 19.73%, the net increase being 13.26%. I think therefore, we can definitely state that it does cost more to earn a dollar in Florida than it does on the balance of the system.

Motion to strike the last statement by Mr. Adair.

Q. From your study of the cost of doing business over the Atlantic Coast Line and especially the cost of doing business in Florida as compared with other systems, and from the analysis which you have mentioned, please give the Court your opinion, as an expert accountant, as to whether the business done, the freight transportation busi-
[fol. 1581] ness done in Florida by the Atlantic Coast Line Railroad Company for the period beginning February 8th, 1929, and ending in March, 1931, was done at a greater or less cost in Florida than over the other parts of the system.

Objection by Mr. Adair on the ground that this testimony is disconnected with the point under inquiry and that the witness has show- no qualification.

A. No, in my honest opinion I don't believe there is any question but what it costs more to earn a dollar revenue in Florida than on the balance of the Atlantic Coast Line system. I have endeavored to indicate to the Court many reasons. The first is the terminal situation, the short haul in Florida of 96, as compared with the mileage in the system. Now, I have also indicated in an exhibit the lesser density of traffic, which is — contributing factor in the economy of operation from the actual study made of out of pocket cost in Florida in the third division, which represents 96% of the mileage in Florida and it shows that the cost——

Q. Never mind what it shows, but from these facts and from your study and with your knowledge as an expert accountant, please state whether the freight transportation business for the Atlantic Coast Line Railroad in the State of Florida for the period beginning February 1928 and ending in March 1931, was done at a greater or less cost than was the transportation for that road over other parts of the system.

Objection by Mr. Adair that the question calls for a conclusion of fact and not for an opinion.

[fol. 1582] A. In my opinion, yes, it costs more in Florida than on the balance of the system. I have prepared an exhibit which I will file as Lamb's Exhibit No. 5. It is a statement of the Atlantic Coast Line Railroad Company showing the operating expenses total and freight for the calendar year ending December 31st, 1929, and in column D, the amount of expenses eliminated from freight expenses and in column E, the amounts treated as so-called haulage expenses. It is in three sheets. I offer this as Lamb's Exhibit No. 5.

Objection by Mr. Adair on the grounds interposed to Lamb's exhibit No. 2 and No. 3.

Column A of this exhibit shows the operating expense account in accordance with the classification prescribed by the Interstate Commerce Commission. The numbers which appear on the left hand side of the first column are those numbers taken from the classification orders as prescribed by the Interstate Commerce Commission in the body of the Act is a designation of the accounts by name. Column B is the total operating expenses both passenger and freight for the Atlantic Coast Line Railroad Company for the year 1929. Column C is the freight proportion of these expenses assigned to freight under the classification and formula prescribed by the Interstate Commerce Commission in current operations. That was not prepared specifically for this case but is copied from our reports to the Interstate Commerce Commission itself under their own requirements and is drawn from that authorized report. I am leading up to an effort to develop the cost of hauling logs. It is impossible to determine with absolute accuracy, the cost of handling any one commodity. Now, [fol. 1583] in order to get what I consider a minimum and maximum cost, I have in column D eliminated certain expenses from the freight operating expenses of the Atlantic Coast Line Railroad. For example, if you will note any item in Column D and turn to the column opposite in which it is reported in the first block, you will find opposite that column the word, yard. Take for example column 212, which was ties—yard. The total amount charged as freight

shown in column C is $285,488,69, and that same amount you will note in column D is eliminated for freight. What I have endeavored to do is to eliminate all yard accounts from the expenses attributable to the hauling of logs involved in this case in Florida.

Q. Now, when you say eliminate yard expenses, are all the items under column D of this exhibit, headed eliminated accounts expenses, which are in column C and which are yard expenses.

A. They are yard expenses in the cases where they are opposite yard accounts but there are other accounts which are not so designated but which I have eliminated. Let's turn to sheet two to illustrate the point: Under the heading, Transportation Rail Line account 373, station employees, you will note that under Column C, headed Freight, there is an amount of $3,281,352.20 and in the next column D, headed, Eliminated Amounts, are the same figures. In other words, I am unable in every account to eliminate the amount that is attributable for logs and those that are not [fol. 1584] attributable for logs and where there is a doubt I have eliminated the entire amount. There is no question but what a portion of this three million and some odd dollars could be properly charged against the handling of logs because those that I could are charged, agents, clerks and attorneys and other operations that are performed in connection with log service but I wanted to get a minimum figure from which fact we could build up the cost of handling logs. The aggregate of all those eliminated items is shown at the foot of this column 2 of the third page, as $9,607,798.67.

Q. Then in Column E, at the foot of that, is the amount $26,701,014.07, and if I understand these two figures right, it means from the total haul of freight hauling expenses, I should say freight expenses shown in Column C and footing $36,308,812.74, you have subtracted these amounts which have been eliminated in Column D and which are specified in detail in that column and which aggregate $9,607,798.67, leaving the amount which you treat as freight haulage expense for the purpose of ascertaining the cost of hauling logs as $26,701,014.07.

A. That is correct with the exception of the figures you have just quoted are treated as the so-called haulage freight expenses. In this exhibit I have made an effort

to eliminate from the freight expense all of these items which deal with terminal service of any form whatsoever and in addition to that I have eliminated a good deal of other expense, all of which are specified in accounts numbered and set out under column D. (P. 335 of testimony.) The amounts which have been eliminated which are the [fol. 1585] total freight proportions are eliminated in column 2. The first item in Column D is under account 351, superintendents. The total of that expense attributable to freight is noted in Column C as $576,571.13 and I have eliminated from that for the purpose of this log cost calculation $456,246.73 and I have treated as being attributable to this freight haulage expense $120,324.40 of this account, of this account 351 and right down in the last block, account 373, station employees, you will note I have eliminated all of them you dealt with there a few minutes ago. That now includes the cost of handling l. c. l. freight. l. c. l. means less than carload and other service. No service is performed by them handling logs that eliminates the entire amount of expenses.

By Mr. Turnbull:

In account 202, roadway maintenance, yard, we are not required to make our reports to the Interstate Commerce Commission and to make it just under that one heading, Roadway Maintenance. We are required under the Interstate Commerce Commission classification to separate them between passenger and freight and between road and yard. The account 202, Roadway Maintenance is subdivided between yard and "other" and that "other" means road. We are required to make that division in our report under that specific head.

Q. But where you are not required to make that division, for instance, under that 373 account, station employees, that you have mentioned several times, that part which you have eliminated as being just your own determination as to what you will eliminate,

[fol. 1586] A. No, because under the account 373, that is the amount that is actually charged to freight in our report to the Commission which we are required to report to the Commission and that, with the total of $3,281,352.20 is the amount we reported to the Interstate Commerce Commission as being charged to freight. I just cut the entire

amount out of the freight proportion, though I honestly believe the freight proportion should be included. Now, that account 351, superintendents, the total is the total amount of total charges. The amount entered in Column C is the amount referred or reported to the Interstate Commerce Commission as chargeable to freight. Now, having eliminated the items shown in account 352 and down through those next four accounts, I took out of superintendents practically all of the superintendents because I eliminated the bulk of the account. In other words, I took out of the superintendents the percentage applicable to the accounts eliminated. The $454,642 which I eliminated was not reported as a special item in the report I made to the Interstate Commerce Commission. The $576,000.00 is represented as a special item. The columns D and E neither one are reported to the Interstate Commerce Commission. They are obtained by deduction. Now, let's go back to this account 351. I will explain what it means. You will note $120,342.40 left in that account 351 as superintendents. I had eliminated the entire charged accounts 352, 354, 353 and 356. Now, having eliminated that amount of expense, the traffic account I likewise eliminated such proportion of superintendents. In other words, from $576,571.13 of superintendents charged to freight, I took out $456,246.73, as superintendents applicable to the other [fol. 1587] accounts in that block I eliminated.

Direct examination continued:

In ascertaining the $120,324.40, which was treated as so-called haulage expense under E of page 2, of the exhibit, I found first that the total amount charged under this account 351 to freight, $576,571.13 and that is in the report filed with the Commission. Then I ascertained the account 352, outside agencies, 353 advertising, 354 traffic association and 356 industrial and immigration bureaus, should be eliminated as a charge against freight applicable to this log business in Florida.

Q. Then you took the aggregate of these four accounts in their proportion that those accounts bore to the account, or rather, explained the relation which those accounts bore to the $120,324.40 that you brought forward.

A. Well, the way that is determined is to take the total of the charges of accounts 351 to 359 inclusive, and deduct the superintendents and then find the relationship of superintendents to the remainder and that percentage of superintendents was applicable or applied to the four items of accounts 352, 353, 354 and 356, which were eliminated and resulted in taking out $456,246.73 of superintendents as applicable to those eliminated accounts.

Mr. Guthiem: Mr. Lamb, continuing on those accounts 351 to 359 inclusive, did you say that the method is this, that in the accounts 352 to 359 inclusive, you were able through your method to make an allowance for the items in Column C as being eliminated accounts, Column D, and amounts treated as so-called haulage expense, column E, [fol. 1588] having ascertained that ratio of these accounts and being unable to make a definite allocation of account 351 you assumed that the ratio would apply to account 351 and allocated on that basis.

A. That, in general, is a correct explanation. I proceeded in the same manner with respect to account 201, but in going back to my figures, I found I had eliminated too much in making the calculations. I brought one over as a 7 and added a superintendent percentage and as a result of which I charged about $20,000 too much to be eliminated. The $62,577.95 should be reduced to $42,750.97 if you applied the same principle but we will not make any change in the exhibit. The error is against us.

Q. There is just one other instance of this sort and it may be well to determine the fact now, and that is on sheet 3 of this exhibit 5, in the heading, general expenses, there is no division of the individual account 451 to 462, inclusive, but there is a division as between eliminated amounts column B and amounts treated as so-called haulage expenses, column E, of the total general expenses, and now I would like to ask Mr. Lamb whether in making that division of the total general expenses, he has assumed that the division would be in the same ratio as the division heretofore ascertained of all other operating expenses.

A. In taking out the amount of general expenses I took the percentage relation of the general expenses to all accounts, excluding general expenses and applied them to the [fol. 1589] amounts eliminated. That is, I assumed that what I had heretofore determined was the fact as I have

testified with respect to the other expenses would apply as to general expenses. On page 3 under column E, I have amounts there treated as so-called haulage expenses in the last column, $26,701,014. That represents what I have termed haulage expenses that relates not solely to Florida but to the system. We are dealing in this statement to the system. The purpose of making this distribution is to get to a figure that is properly distributed on a gross ton mile per car mile basis. For instance, yard expenses are not assigned on a gross ton mile or car mile basis and in order to get the accounts that are properly assignable on a gross ton mile or car mile basis, I have eliminated all the yard and terminal expenses as indicated in Column D.

Direct examination continued:

On page 3 I have total out of pocket expenses as I previously explained I had developed from an analysis of the accounts costs per gross car mile and per loaded car mile and those expenses were the same accounts or amounts I have used here. They are listed here and were applicable to the third division only. I have previously explained we do not assign our expenses generally to the State of Florida directly as between passenger and freight expenses. Now, in order to bring up to 100% or to make the cost per gross ton mile or per car mile equal the total of the so-called haulage expenses or total operating expenses I have gotten the relation of the system for the same identical accounts to the total expenses. At the bottom of this statement you will (P. 340 of testimony) see ratio to total [fol. 1590] freight expenses 19.0606% and right above that ratio to so-called haulage expenses 25.9192%. In other words, the so-called out of pocket expenses are only 25% of this haulage expense and only 19% of the total freight expense. Now, that represents 25% and for the purpose of illustrating the point, if we have costs that represent 25% and divide by 25 and multiply by 100, we get the 100% of that particular cost. That is the purpose of developing up to this point those figures. I am going to use in the other exhibits yet to come, those percentages of 25.9192% and 19.0606%. In Column A, I used the 25% and in Column B the 19%. I will explain those when we get to them. I have prepared the statement showing the method of as-

signing taxes and five and three quarters per cent return on investment for the Atlantic Coast Line Railroad and I now file it as Lamb's exhibit No. 6, being a statement setting forth these various figures.

Objection by Mr. Adair.

Five and three-quarters return on investment is the percentage almost universally used as representing the reasonable return under the transportation act. In other words, under the transportation act, if a carrier's earnings exceeded six per cent, there is a recapture. The Commission has generally used five and three quarters per cent as a reasonable return and I have adopted that in my calculation. I cannot say definitely that they prescribe five and three-quarters per cent as a reasonable return but it has been usual if it exceeds six per cent that under the transportation act they recapture one half of the excess. These [fol. 1591] figures in Exhibit No. 6 are taken from our annual report to the Interstate Commerce Commission as per notations here. The figure we want to use here in this connection is Florida taxes $2,115,260.76. That is shown on lines 7 and 10, as taken from line 247 page 707 from the report of the Florida Railroad Commission, total operating expenses for the State of Florida, which were $13,739,-933.06. The taxes $2,115,260.76 or 15.3950% of total operating expenses. The property investment shown at the bottom of the exhibit, the figures are taken from my first exhibit line 6, and total operating expenses taken from page 309, line 247 I. C. C. reports and are shown for 1929 to have been $53,431,589. The amount assignable to freight is $36,308,813. The freight percentage of total operating expenses is 67.95%. Five and three-quarters per cent on return on investment as shown on line 5 at the bottom of the statement would be $17,620.257. The freight proportion 67.95% is $11,972,965 and the ratio for freight operating expenses is 32.97536%. Now, I might say I have had adopted the ratios in Florida and the Florida expenses instead of the system expenses. That last percentage would be 42.79% instead of 32.97%, which I will use on my exhibit. In other words, on the exhibits which I will subsequently file the return on investment is understated approximately ten per cent. I have prepared an exhibit showing the estimated cost for handling logs in Florida

based on out of pocket expenses actually assigned to the third division of the Atlantic Coast Line Railroad Company operating entirely in the State of Florida.

[fol. 1592] Going back to this other report, it represents the year 1929. It shows on line 1 under five and three-quarters percent, return on investment as December 31st, 1929. The log traffic, generally speaking, is hauled in single carload lots in local trains the same as single carload lots of perishables and other freight. I am testifying as to how the log transportation is handled in Florida. I said the handling in single carload lots by local trains is the same as single carload lots and perishables l. c. l. and other traffic, the exception of this being the train load movement between Hines and Palatka. The same pick up service is given the single carloads lots as any other traffic, perishables or otherwise, and now, as I explained in connection with one of the previous exhibits, I wanted to get what I thought was the minimum cost or something less than the actual cost because it is impossible to absolutely determine the cost of any one commodity and that figure, by the way, will be shown in Column A of this exhibit. In Column B are included all of the elements, some of which may not be applicable to logs. In Column A I have used the haulage expenses, I have eliminated those items. In exhibit No. 5 I eliminated $9,607,798.67 of items which I have explained at some length and in dealing with this Exhibit No. 7, Column A, I have not used any of these items. In other words, I treated them as having been eliminated in making the figures under Column A. They are included in Column B. They are really four elements of cost in connection with the handling of any one commodity. Now, in Column A I have eliminated all of the terminal expenses, that nine million and some odd dollars is the terminal expense eliminated and I think I can support the statement that a portion of these expenses should be charged against the log traffic. The loss and damage on these expenses are included [fol. 1593] in my statement over here under haulage expenses. In other words, I did not eliminate the amount of loss and damage charged to account 418 but I have made an investigation of the effect of that and it would only change the cost as reflected in this exhibit by 74¢ per car. That 74¢, the maximum effect on any of these exhibits taken

on the 169 miles would be 74¢, that is it would reduce it, but there are so many elements I have eliminated that do not affect the figures of column A, or in other words, I could add 10% in column A for return on investment; but I have understated it 10% so that it will more than off-set any cost in appreciation. The accounting department prepared for use in the previous case a statement showing from the period beginning February 9, 1929, to January 31st, 1931, inclusive, the number of cars of logs more than six feet in length moving between stations of the Atlantic Coast Line Railroad in Florida, which statement also shows the weights and revenue under the so-called Cummer Scale. I have obtained the weight and revenue shown on these and subsequent exhibits from that statement. The average net was 81.36 miles as shown in Column 1. The average revenue per car, $15.12, is shown in line 3. (P. 345 of testimony.) I offer this statement as Lamb's Exhibit No. 7.

Objection by Mr. Adair.

Line 3 shows the average weight in pounds as 56,754 pounds. Line 4 shows average tare weight in pounds as 33,000. That is, weight of the car. As the car is hauled back, line 5 shows the same figures for the empty haul of 33,000 pounds. Line six shows gross weight in pounds of 122,754; line 7 shows gross tons which are obtained in dividing the figures in line 6 by 2,000 and that shows 61,377 tons; line 8 shows the gross ton miles and is obtained by multiplying the gross tons in line 7, 61,377 by 81.36 miles as shown in line 2 and produces 4,994 gross ton miles. Now, [fol. 1594] line 9 shows out of pocket expenses per gross ton mile as .0882888 cents. That is the cost that I previously stated was developed on the third division for gross ton miles. That was for out of pocket expenses, and as I have shown on previous exhibits, these out of pocket expenses equal 25.9192% of the total freight haulage expenses. That figure is shown on the bottom of the third sheet of exhibit No. 5 by dividing .0882888 by 25.9192% and multiplying the result by 100 to get the cost per ton per mile placed at 100%, as shown on line 10 as .3406309 cents in Column A of haulage expenses and dividing that figure of .882888 cents by 19.0606% I get the cost of .4632005 cents as the cost of gross ton mile shown in Column B and in all

freight expenses I have multiplied that by 100 to obtain that result. Now, if we take the gross ton mile shown on line 8 as 4,994 and multiply it by the figure shown on line 10 we will get in Column A opposite line 11, operating cost, $17.01 and in column B $23.13. That is obtained of course, by multiplying the figures on line 10, Column B. As the revenue was only $15.12 and the expenses $17.01 even under the haulage expenses alone, there is no income tax to be charged. As shown by the previous exhibit No. 6, the percentage of Florida taxes to freight operating expenses is 15.3950%, and multiplied by $17.01 as shown in line 11 by the percentage as shown in line 13, we obtain $2.62 as representing the taxes applicable to this movement under column A and $3.56 under column B. The sum of the oper- [fol. 1595] ating expenses and taxes shown on line 14 under column A is $19.63 and under Column B $26.69. Line 15 shows the five and three-quarters percent return on investment and is obtained by multiplying the cost of line 11, operating expenses, $17.01 in Column A, and $23.13 in Column B by the percentage 32.97536, which shows in Column A, $5.61 as return on investment and Column B as $7.63. Line 16 shows the total cost, including return on investment as $25.24 in column A and $34.32 in Column B. Now, as the revenue earnable under the so-called Cummer Scale produces only $15.12 and the cost for even operating expenses alone was $17.01, it seems to me to clearly demonstrate that the Cummer Scale is unreasonably low and does not pay a proper proportion of expenses or contribute to return on investment. The $17.01 does not take into account any amount of any kind of taxes. There were no income taxes during this period for transportation because we attributed no profit to it. There is an ad valorem tax of $2.62 which we did attribute to this account. Then the operating expenses and taxes which include amounts in lines 11, 12 and 13, operating costs, income taxes and Florida taxes comes to $19.63. Line 14 is the $17.01 plus $2.62. Now, line 15, return on investment, that is not included in the $17.01. You add that to the other figures. Now, the total operating cost, excluding the taxes and return on investment, which in my opinion is proper to attribute to this cost the average car on a gross ton mile basis is not included in the $17.01. That $17.01 of operating cost

as compared with the gross revenue of $15.12 so without including any of these items we should have a loss of our calculation under column A of this exhibit per car of approximately $1.89, and it is correct that when we include [fol. 1596] the taxes and the return on investment the loss on that car becomes $10.12 under Column A and when I attribute the eliminated items of this cost and by eliminated items I mean the ones we have been describing in exhibit 2, aggregating $9,607,798.67, I get an operating cost of $23.13 as against the gross revenue of $15.12 and I get a tax item and operating expense of $26.69 and you get a charge of $7.63 for return on investment on a total cost of $34.32.

In my opinion the figures in Column A understate the cost of handling these logs because I have eliminated therefrom certain expenses which might be properly charged against them and further than that I have used the percent in getting return on investment approximately ten percent less than I might properly have used by applying the Florida ratio which would incre-se the cost and substantially [fol. 1597] be the Florida ratio. I mean this, if I had taken the Florida proportion, the Florida expenses, passenger and freight and found the relation of the five and three quarters percent return on investment as I did on Exhibit No. 6 of the system, showing a percentage of $32.97536, it would have been 42.79, or in round figures ten percent greater than I actually used. In other words, line 7 of Exhibit 6, under the heading five and three quarters percent return on investment shows 32.97536% and that is for the system and if the same ascertainment were made on Florida and the Florida business it would be some 42% or 10% more and for that and the other reasons I maintain that the cost stated in Column A, substantially understates the cost of handling these logs. Now, by reason of the fact that there are certain expenses that cannot be properly charged against the log traffic, the figures shown in Column B perhaps overstate it and I do think they overstate it, so that the actual cost of handling the logs lies somewhere between these two figures. It is absolutely impossible to determine the cost and the cost is somewhere between them, but as the hauling cost, which eliminates all of these items, some of which could be properly charged in

logs, includes the total cost, including taxes and reasonable return on investment in excess of the revenue derived under the Cummer Scale. It is my opinion that the Cummer Scale is absolutely too low and unremunerative and does not contribute the proper proportion of its expenses and return on the investment. This is predicated on a single carload. This is on an average. I have prepared the same kind of [fol. 1598] exhibit based on loaded and empty car miles, which I will name Lamb Exhibit No. 8. Now, on both of these exhibits were foot notes, note A being Item 9, equals 25.9192% of total freight haulage expenses. (Item 9-A corrected to read 10-A.) Note B, item 10-B equals 19.0606% of total freight expenses. (P. 350 of testimony.) This and the percentage which are to be found on my Exhibit 5, page 3, underlined 402, under general heading, out of pocket expenses freight, which I have heretofore explained.

My Gutheim:

Q. May I have you to get Mr. Lamb to clear up one point on these same notes. I am asking because on this Exhibit 7, the note speaks of Item 9-A and there is no Item 9-A on the exhibit and then speaks of Item 9-B and there is no Item 9-B on the exhibit and I am mystified as to how it should read or whether he could explain that.

A. Item 9, I think perhaps your criticism is just. Line 9 shows the out of pocket expenses of gross ton miles of the figure .0882888 cents. The idea of this note was to show how the cost was raised to 100% for the haulage expense and 100% for all expenses in Columns A and B. on line 10. I think if that were switched to 10 instead of 9 it would be a little clearer. (Items 9-A and 9-B at the bottom of the page of exhibit 7 was then changed to read 10 and on exhibit No. 8, item 5-A and item 5-B were changed to read 6-A and 6-B.) The same corrections will have to be made on subsequent exhibits. I now file as part of my testimony exhibit marked No. 8. The estimated cost of handling logs in Florida based on out of pocket expenses [fol. 1599] actually assigned to the third division of the Atlantic Coast Line Railroad Company operating entirely within the State of Florida based on the cost per loaded and empty car mile. Now, the calculations on this exhibit are similar to the ones on previous ones with the exception

that you will note simply that line 3 shows the empty mile haul that is added into the first item of line 1, making a total mileage of 162.72. In this case we are getting the car miles loaded and empty and the out of pocket expenses loaded and empty car miles as found on the third division for out of pocket expenses, 2.95171 cents by dividing that figure by 25.9192 percent, and multiplying the result by 100 we get the total haulage cost on line 6 of 11.388314 cents and 15.486186 cents in Column B. Now, by multiplying the figures in line 4, the total car miles, by the figures in Column A and B respectively, we obtain on line 7 the operating cost of $18.53 in Column A and $25.20 in Column B. There is no income tax but applying the same principles I have explained in previous exhibits on line 9 we have $2.85 for taxes in Column A and $3.88 in Column B. The sum of the operating expenses and taxes is shown on line 10 and in Column A as $21.38 and in Column B, $29.08. Line 11 shows return on investment, five and three-quarters per-cent, which is obtained by applying the percentage shown on line 11 to the operating cost on line 7. It shows in Column A to be $6.11, in Column B $8.31. Line 12 shows the total cost, including return on investment in Column A, $27.49 and Column B $37.38. The same comments I made with respect to Exhibit 7 as to the unreasonableness of the Cummer Scale applies in like degree to this exhibit, [fol. 1600] this being an exhibit based on the cost per loaded and empty car mile ascertained on the gross per ton mile basis. This exhibit offered as Lamb's Exhibit No. 8.

Objection by Mr. Adair on the grounds previously stated that the contents constitutes a conclusion of the witness and that the figures constitute no primary source of evidence.

In my opinion as an expert, the Cummer Scale of rates on the average haul, applicable to the average haul of logs during the period under inquiry, which average haul was 81.36 miles does not equal the actual cost of the service by contributing anything to taxes or return on investment.

(Objection by Mr. Adair to this exhibit and this line of testimony on the ground that these averages are system averages wholly and constitute no basis for determining the transportation of the single commodities and that it

has not been shown what proportion of this so-called average haul is in train load movement or carload movement.)

The out of pocket cost as shown on line 9, exhibit 7 and line 5, exhibit 8, were the out of pocket cost of the third division. They have been placed on this exhibit and compared to the 100% on the system ratio. In other words, the relation on the system on the same out of pocket expenses to the total system car expenses or car expenses on these two exhibits. I think it works a little disadvantageously to Florida in that particular case in that percentage, which I will explain later. I have prepared an exhibit showing the cost of handling the logs in Florida based on out of pocket expenses actually assigned to the third division of the Atlantic Coast Line Railroad Company, operating entirely within the State of Florida based on cost per gross ton mile and applicable to traffic from Perry to Eastport [fol. 1601] and this is filed as my exhibit No. 9A. This exhibit which I had marked as No. 9 consists of seven sheets and is similar to my exhibit No. 7, based on the cost per gross ton mile showing the movements for distances of 169 miles, 152 miles, 130 miles, 119, 99.68 and 52 miles. Taking the first sheet of the exhibit covering the movement from Perry to Eastport, a distance of 169 miles, the revenue under the so-called Cummer Scale is $22.10. In Column A, line 11, will be shown the operating cost of $36.19, line 13, Florida taxes of $5.57 and line 14, showing operating expenses taxes of $41.76. Line 15, return on investment of $11.93 and line 16, total cost including return on investment $53.69 in Column A and $72.03 in Column B. Now, the same comments I have made with respect to the other exhibits relative to the use of the low percentage. Line 15 applies with like force to all of the subsequent exhibits which I will file. Now, under note A, Item 9 and Item B 9 be changed to read 10 according to corrections previously stated. I will have those changed on all the copies. The calculations are made in a similar manner as on Exhibit 7 which I have explained in some detail. In my opinion as an expert, the rate under the Cummer Scale and applied during the period now under investigation for the transportation from Perry to Eastport, a distance of 169 miles, would not pay the operating cost.

By Mr. Adair:

Q. Now, where that comes in a single carload of logs as distinguished from trainload logs.

[fol. 1602] A. Yes, sir, there have been movements shown from waybills in my possession and from my audit of freight accounts which shows it.

Q. Ase a matter of fact, the movement from Eastport is about 90% trainload.

A. It moves in partial trainload lots filled out at Carbur. That is within seventeen miles of Perry. (P. 355 of record.) It is correct that in addition to the operation cost there is a tax and investment return and those items added to the operating costs would move that operating cost up some, from $36.19 to $53.69, and the revenue per car was $22.10.

Mr. Alston: Instead of marking this exhibit 9-A etc. we will just make seven exhibits of the same. Under this exhibit the movement is shown of 152 miles and the gross rate under the Cummer Scale per car was $20.30, and the operating cost, as I have ascertained and is shown in line 11 was $32.54 per car, that is, in Column A, excluding all terminal cost. In Column B that cost was $44.25, and that includes all terminal expenses and when I have arrived at that and add to that the revenue on investment and the taxes under Column A, the total cost as shown in line 16 would be $48.28 under Column A and $65.65 under Column B on a gross rate return of $20.30. The next exhibit is No. 11 from Homasassa to Perry and that is 130 miles and the gross return on 162 miles per car under Column A is $28.82 and under Column B $39.20, and when you add to that the taxes and return on investment on Column A, that would be $42.76 under Column A and under Column B, $58.16 as against gross returns of $20.62. My exhibit No. 12 shows a distance from Hines to Palatka, a distance of 119 miles. [fol. 1603] The revenue is $19.96. The operating cost in Column A, $26.01 and Column B, $35.37 and adding taxes and return on investment, the total cost in Column A is $38.59 and in Column B $52.48 as compared with $19.96 revenue. The whole movement from Hines to Palatka is in trainload movements and I will cover that later. This would show what the effect would be on single carload movements if there were any single carload movements.

Taking exhibit 13, which covers from Aster to Groveland, a distance of 99 miles, the revenue is $13.78, operating cost $19.56 in Column A and $26.59 in Column B. When we add the taxes and return on investment, the total cost, including return on investment in Column A is $29.02 and under Column B, $39.45. Exhibit 14 covers movement from Homasassa to Lacoochee, a distance of 68 miles, the revenue per car is $12.44, the operating expenses $13.59 in Column A and $18.48 in Column B. While taxes and return on investment, when they are added, the total cost in Column A is $20.16 and in Column B $27.41. Now exhibit 15 will show the movement from Homasassa to Otter Creek, a distance of 52 miles; the revenue is $12.02; the operating cost as shown on line 11 under Column A is $10.81 and Column B $14.70. The taxes, $1.66 and return on investment, $3.56, making a total cost in Column A of $16.03 and Column B $21.81, as compared with $12.02 revenue. The figures in Column A of course, as I previously stated do not state the cost and do not include any terminals, station or agency costs whatever and nine million and some odd dollars that I eliminated, while Column B does include it. Exhibit 16 covers movement from Perry to Eastport based on the cost [fol. 1604] per loaded and empty car miles, the revenue was $22.10; the operating expenses $38.49 in Column A and $52.34 in Column B, and when taxes and return on investment are both added the total cost in Column A is $57.11 and $77.66 in Column B, against the revenue of $22.10. Exhibit 17 is also based on the cost of per loaded and empty car miles covering the movement from Carbur to Eastport a distance of 152 miles. The revenue is $20.30 and the operating expenses in Column A is $34.62 and under Column B is $47.08, the total cost including taxes and return on investment being $51.37 in Column A and $69.85 in Column B. Exhibit 18 covers the movement from Homasassa to Perry, a distance of 130 miles and on the same basis, the revenue is $20.62; operating expenses $29.61 in Column A and $40.26 in Column B, and when taxes and return on investment are added the total cost in Column A is $43.93 and Column B $59.74, against a revenue of $20.62. Exhibit 19 on the same basis for the movement from Hines to Palatka, a distance of 119 miles, the revenue is $19.96; the operating expenses $27.10 under Column A

and $36.86 under Column B. When taxes and return on investment are added, the total cost in Colnmn A is $40.21 and in Column B $64.68. The cost per mile is on the percentage basis, the percentage used for rates are the system's. Exhibit 20 is the movement from Astor to Groveland, a distance of 99 miles; the revenue is $13.78 under the so-called Cummer Scale; the operating expenses under Col-
[fol. 1605] umn A, $22.55 and under Column B $30.66. When taxes and return on investment are added the cost is $33.46 under Column A and under Column B, $45.49. Exhibit 21 on the same basis shows a movement from Homasassa to Lacoochee, a distance of 68 miles; the revenue under the so-called Cummer Scale is $12.44; the operating cost is $15.49 in Column A and $21.06 in Column B. When taxes and return on investment are added the cost in Column A total is $22.98 and in Column B, $31.24. Exhibit 22 covers the movement from Homasassa to Otter Creek, a distance of 52 miles, based on cost for loaded and empty car mile, the revenue under the so-called Cummer Scale is $12.02; the operating expenses $11.84 in Column A and $16.11 in *B*olumn B. When taxes and return on investment are added the total cost in Column A is $17.56 and in Column B $23.90. Concerning the difference between the carload and trainload movements and cost thereof, as they affect these exhibits (P. 359 of testimony) I think it is proper to state when handled in solid trainload lots the cost is less than when handled in single carload movements and the costs that I have shown up to this point are based on handling in less than solid trainload lots. During the period under inquiry, from February 8, 1929 to March 1st, 1931, there was a movement from Hines to Palatka in trainload lots and while not in solid trainload lots there were movements from Perry to Eastport in more than a single car but not a solid trainload movement. I cannot say how many of these movements from Perry to Eastport there were during this period. There were only 142 cars all told
[fol. 1606] from Perry to Eastport as they moved during the period from February 8th, 1929 to January 31st, 1931 and there could not have been any substantial movements in trainload lots. In reply to Mr. Gutheim's question sometime back, I referred in my exhibits particularly as to Exhibit 7, that some of these exhibits were attributable to

these movements on the system's averages and then I did say to some extent they were disadvantageous to Florida. To make it clear, the figures showing the cost per gross ton mile or per loaded and empty car mile are the third division costs or the cost in Florida. Now, the percentage shown under the whole system at the bottom of these exhibits are the ratio for the out of pocket expenses to the total haulage expenses or to the total freight expenses. Later I will file some exhibits similar to these just filed where the percentage to be used is similar to these shown at the bottom of the sheets will not be system ratios but the Florida ratios and those percentages, for example, instead of being 25.9192% of the total car haulage expenses will be 31.2748% and 19.0606% of the total freight expense will become 22.5788% and to the extent of the difference between these two percentages the system ratio worked against the Florida Commission. That is the point I wish to make. In my opinion the State of Florida has been given a substantial benefit in the calculations of expenses attributable to this traffic by the elimination of the nine million and some odd dollars of terminal expenses, 9,607,798.63 of terminal expenses shown under Column B, exhibit 5.

[fol. 1607] It is correct that I testified that in attributing expenses to Florida for such things as coal used for its engines and for other material shipped in such as rails and any other kind of material that may be brought to Florida, whatever it may be, in making those calculations no transportation charges for services rendered by the Atlantic Coast Line Railroad out of the State of Florida has been charged. There is no transportation or accounting reason for that. Simply, that we do not attempt to assign our expenses directly to states. If we do so assign them, a proper accounting would call for an assigned charge against the State of Florida for its proportion of the cost of transportation of material and supplies used in Florida over the balance of the system to the Florida state lines. In my opinion, if the Oklahoma Formula was applied to this transportation the revenue under the Cummer Scale would not have been sufficient to have paid the cost of transportation plus the taxes and five and three-quarters percent return.

Q. Please say to the Court as an expert whether or not in your opinion, under any formula known to you, of ac-

counting for a distribution of expenses, the Cummer Scale rate would produce a return to the Atlantic Coast Line for the transportation demanded thereunder during the period involved in this present inquiry, equal the cost of transporting plus taxes and five and three-quarters percent return on the value of the property.

[fol. 1608] Objection by Mr. Adair on the ground that the witness has not shown himself qualified as an expert and that the figures upon which the question is based has nothing to do with the cost of transporting logs but is the average cost of revenue produced over all the system of the Atlantic Coast Line Railroad Company for the transportation of all the various commodities.

A. In my opinion it would not. There is no basis that would produce the cost that would show the Cummer Scale would return an amount in excess of the operating expenses, taxes and return on investment.

Q. Mr. Lamb, on the theory that there is a difference of cost per car in handling this traffic in trainload lots as compared with handling it in single carload lots and on the basis of movements of trainloads involved in this matter during the period under inquiry with a possible small exception, which you have already dealt with, please say whether or not in your opinion, this Cummer Scale of rates provided a return that would have provided a return to the Atlantic Coast Line Railroad during the period under inquiry for the transportation in trainload lots of logs from Hines to Palatka equal to the cost of rendering the service plus taxes, property values, to give them a reasonable return, to-wit, five and three-quarters per cent on the value of the property.

Objection by Mr. Adair on the ground that it is not shown that the witness knows anything about the cost of trainload movements.

A. In my opinion, even in trainload lots, Hines to Palatka, the revenue under the so-called Cummer Scale would [fol. 1609] not pay the cost (P. 365 of testimony) of operating expenses, taxes and a reasonable return on investment. That is during the period inquired about. I have made studies of the Hines to Palatka trainload movements and in a hearing before the Interstate Commerce Commis-

sion last year I filed a statement showing the cost of handling the log train operated between Hines and Palatka for the month of November, 1930. I worked out the cost based on that assigned for expenses to the Hines to Palatka trainload movement and find that the total cost, including return on investment for hauling expenses was $27.10 against $19.96 revenue and $36.84.

Showing a total cost of return on investment of $27.10 under Column A as for haulage cost and $36.84, including all cost. I mean Column A wherein the terminal costs have been eliminated.

Q. Now, Mr. Lamb, please state under what circumstances those figures which you have stated were made and by whom they were made and from what source they came.

Objection by Mr. Adair to the witness testifying about the figures without producing them.

A. On a previous hearing I filed as my Exhibit 133, a statement which stated the out of pocket expenses in detail totaling $2,398.55. Those are the out of pocket expenses in handling these log trains during the month of November, 1930. The gross ton miles handled on that train as shown by that exhibit were 3,863,451 miles. I prepared these figures principally from information which I received. (P. 367 of testimony.)

[fol. 1610] The Superintendent of Motive Power of the Atlantic Coast Line Railroad Company furnished me the detailed cost of these trains. I file as part of my testimony, marked Exhibit No. 23, the exhibit which shows these expenses. This statement shows that during the month of November, 1930, the log train Hines to Palatka made thirteen northbound trips and twelve southbound trips and in the statement it shows in detail the gross ton miles and the operating expenses of each of the out of pocket items heretofore referred to. The statement shows that the total out of pocket expenses were $2,398.55 and that the total gross ton miles were 3,863,451 and *and* that makes the cost per gross ton mile .06283 cents and raising it to 100% the cost per gross ton mile is .239328 cents for hauling expenses and .325713 cents for all expenses.

Objection by Mr. Adair to the witness testifying concerning the statement without offering the statement in evidence.

During the month of November there were 494 carloads of logs handled creating gross ton miles of 3,734,936, which divided by 494 cars produces the gross ton miles per car of 6,622 and multiply this figure by the out of pocket expenses by gross ton mile we have .239328 cents, producing $18.24 of operating expenses and apply the income tax per cent of 3.00985 and assigning five cents for taxes and the Florida ad valorem tax of $2.80 and return on investments $6.01, making a total of $26.10 under hauling expenses. The operating expenses, including all expenses, would be $24.83, with taxes of $3.82, (Page 370 of testimony) and [fol. 1611] return on investment of $8.19, making a total cost of $36.84. I am reading from a memorandum which I personally prepared for my own use and the basic figures are from exhibits filed in response to a request from the opposition as my exhibit No. 133 of the record before the Interstate Commerce Commission in the case now pending there.

I offer this statement as Lamb's Exhibit No. 23.

Those figures are the actual tonnage taken of the movement in our car accountant's office in Wilmington. They are under my supervision. Those records are in the office of the Atlantic Coast Line in Wilmington. The items represented for account 392, train enginemen and 401, trainmen, were furnished me by Superintendent Langley of the Atlantic Coast Line Railroad Company, under whose jurisdiction these trains operate. The remaining expenses were furnished me upon my personal request by Superintendent of Transportation. They are prepared from the actual payrolls, which payrolls and issues are under this superintendent's jurisdiction.

Cross-examination.

By Mr. Gutheim:

As general auditor of the Atlantic Coast Line Railway, I report to the Comptroller. I am next in authority to the Comptroller of all the accounts. We keep the accounts for the Atlantic Coast Line Railway in accordance with th classification of the Interstate Commerce Commission. They are kept in several departments under my immediate

supervision. We make annual reports of the operation of [fol. 1612] the Atlantic Coast Line Railway Company and the financial results of these operations to the Interstate Commerce Commission. Those reports are made under my immediate supervision and in my office and we make similar reports so far as intrastate traffice is concerned, to the various state railroad commissions through which we operate and that includes Florida. These reports are made in my office. They show such items as investments, freight revenue, freight expenses, net income and the like. They also show the classification of the tonnage on which that revenue is earned. That classification falls under different heads such as products of agriculture, products of mines and products manufactured and each of these classifications show sub-classifications to some extent. They include subdivisions sufficient to apprise you of the general classification of the tonnage that earns the revenue. The classification of the traffic for the Atlantic Coast Line Company in the State of Florida is for the tonnage revenue freight carried within the State of Florida for the year ending December 31, 1929; total products of Agriculture representing 83,569 carloads; total animal and animal products 82,576 carloads; products of mines, 78,540; products from forests, 62,413, and miscellaneous 62,924, out of a grand total of 293,902 carloads. Products of agriculture would include various grains, fruits and vegetables and the like of that. There is a substantial amount of agriculture products in Florida that is original tonnage. It is true that a very substantial amount of that leaves the State [fol. 1613] of Florida out of which we get revenue. In our products of animals that includes livestock, products from livestock, fresh meat, salt meat and the like, and products from forests would be logs and lumber and products from mines would be gravel, sand, glass for moulding, broken glass, ground or crushed, bituminous coal, coke or other stone and then we have the manufactured products that for the most part come in Florida. I should say that a little larger proportion comes in Florida than was revenue freight originating within the State of Florida. From miscellaneous 41,393 carloads and from that terminating within the State 43,801, makes it approximately fifty-fifty. I have made no personal check of the logs. In Exhibit 1, the figures in the various columns headed, Average Miles

Operated, Miles of Road Operation, or the Average of Roads Operation, I am prepared to say how the percentage of single track and multiple track roads vary as between Florida and outside of Florida on the Atlantic Coast Line. For 690.39 miles of total to track operation there is 78.60 miles that are in Virginia; 183.64 in North Carolina; 22.83 in South Carolina; 75.05 in Georgia (P. 375 of testimony); 129.63 miles in Florida, and .64 miles in Alabama. About eighteen per cent in Florida. Arithmetical calculations that produce the revenue ton miles in Florida for the number of tons handled in Florida multiplied by the number of miles it moves that is the actual movement in Florida [fol. 1614] whether it begins and ends in Florida or begins in Florida and goes outside or begins outside and goes in Florida. The tons we produce in getting that result are the tons of the various commodities I have already referred. I think it is an acknowledged fact that the different tons, according to the different classification, produces different levels of revenue. We have products that produce very heavy freight per ton and fruit and vegetables would be in that class, and our live stock and products from live stock would be in that class and our manufactured goods would be in that class. In my exhibit No. 2, in picking the year 1926 as the first one at which to begin after 1922, I was just carrying out an exhibit I had filed in a previous hearing. I added on 1931 and added on 1922. 1926 was a big year for the Atlantic Coast Line Railroad Company. With respect to Exhibit 2, and with respect to revenue it is the largest amount of revenue value for any other year. We have $30,330,194.04 in 1926, which is the highest of any year. In 1922 we had $17,851,388.48, but in 1931 we only had $14,404,883.50. With respect to Exhibit No. 2, I divided the revenue as between Florida and the balance of the system in this manner. The revenue collected is prorated on interstate traffic over the system on a mileage road rate for the traffic charges. Intrastate revenues are assigned 100% to Florida. That is true as regards the fact that Florida may be the originating or terminating state. It is largely an originating or terminating state. The revenue that is operated and allocated to Florida is purely [fol. 1615] on a mileage basis. It is correct that if the haul in Florida is one hundred miles and the total haul on the system is four hundred miles, twenty-five percent of the

revenue goes to Florida. The way we assigned the operation of expenses to Florida as used in this exhibit was on a revenue basis, which assumes the same ratio basis in Florida as on the balance of the system, which assumption is erroneous because it costs more to earn a dollar in Florida than on the balance of the system. We do not use the separation of expenses to Florida as shown on this Exhibit 2. In our subsequent computation that we assume to represent the cost of transporting logs. I mentioned the fact in respect to the property investment account on this Exhibit 2, the Atlantic Coast Line would not accept the valuation of this property as found by the Interstate Commerce Commission. It is not true that the Interstate Commerce Commission when it values our property does not include as a part of the valuation the precise terms of cash on hand and materials and supplies on hand, as shown on a balance sheet. They provide what they term a working capital, which is in substance, material and supplies and cash. Nobody knows exactly what the Commission includes as working capital. I wouldn't say that in so far as the practical result of our placing is concerned of materials and supplies on hand and cash on hand, as shown on our balance sheet, that that is given no weight by the Interstate Commerce Commission at all. In practically the majority of the exhibits filed you will find that the Bureau [fol. 1616] of Railway Economics include that in their expenses. I have studied the formula of the Interstate Commerce Commission for producing a property investment of materials and supplies and cash on hand and reply to their valuation, which they had sent out, which are very voluminous. I don't think anyone understands it, even the Commission itself.

Q. Do you understand this, that in determining the final figures as a part of the investment on which you are entitled to earn for material and supplies and cash on hand, the formula of the Interstate Commerce Commission disregards entirely materials and supplies and cash on hand, which you show in the balance sheet?

A. I cannot say how they arrive at it and I don't know that they disregard it entirely.

Q. That is the question. You don't understand it?

A. Neither does anyone else.

Q. You are prepared to say that the Interstate Commerce Commission for any one of these years that you show on exhibit 2, would include in your investment as figures on which you are entitled to earn, the figures showing materials and supplies and cash on hand, that appear in this Exhibit 2?

A. I couldn't answer that. I don't know what they would show. I have endeavored to check it and couldn't tell how they got at it. There would be certain items in dispute and frequently the Commission would state certain figures and then finally come out with their valuation and we don't know what items they include or exclude, but we know in computing valuations they make an allow- [fol. 1617] ance for materials and supplies and cash on hand. I don't know how they get at the figures but I think they necessarily must (P. 380 of testimony) consider, and I know they consider, the materials and supplies and cash on hand. The method by which I made the division of materials and supplies and cash on hand for the system to make the allocation of percentages, is that I knew the track mileage percentage for both of these items and taking the year 1926 to illustrate, I found that after we had used the first track plus the second track mileage result on the return on investment, which is now shown as 5.41% in 1926. It would be increased to 5.45%. With respect to this Exhibit 2, in the operating expenses, there is no charge made on our locomotive fuel coal and for the transportation actually performed on that coal over our rails because that was the system ratio and nothing was added in there.

Q. When you came to the exhibit that Mr. Alston says he will file as your No. 23, that is the check which you made of the cost of the transportation of logs in the traffic from Hines to Palatka, did you or not, include in the cost of locomotive fuel, coal, expense of transporting the same on the Atlantic Coast Line Railroad Company's rails?

A. At the hearing in Washington on July 21, 1931, when I filed this exhibit I was asked to explain why the fuel cost seemed to be higher than the ratio for the system. In response to that request I filed a letter dated July 31st, 1931, [fol. 1618] explaining in some detail why that cost seemed to be relatively high. Our general superintendent of motive power who furnished me the entries for the fuel

deducted from the tickets used at each coaling station showed the total amount we issued for those log trains at Palatka, 136 tons at a cost of $3.364 per ton, amounting to $457.50, and at Wilcox 155 tons, costing $2.573 a ton, or a cost of $398.82. Yes, we have included in the cost of locomotive fuel, coal, the cost of transporting that coal on the Atlantic Coast Line to the Florida State line. The only point is we didn't charge enough for it. We charged the rate of five mills per ton per mile for the handling of this movement.

Q. And that is the five mills which Mr. Perrin referred to in his testimony as the figure which he says the freight traffic manager had authorized to be charged on coal material.

A. I don't know that that is the same figure. Five mills per ton per mile, it is what we used though. Now, I think, Your Honor, that is entirely proper to charge that in this determination of the cost of the handling of logs. As I explained this morning, we don't directly assign that expense to Florida and therefore do not charge to Florida any expense incident to the moving of the vast amounts of material used in Florida over the balance of the system. Now, in developing a cost for handling a specific commodity, it is entirely proper to add the cost of five mills per ton per mile from the point of origin, to the point where it [fol. 1619] was moved to. We charged only to the Florida state line but we, in ascertaining the cost of logs in these trainloads from Hines to Palatka, could have properly charged it down to the points at Palatka and Wilcox where it was loaded into the engines during this service, and I think I can, or I will state, as my opinion, that it is entirely proper to include that cost. Let me illustrate in this way. Possibly it is a little bit better for this illustration to state that in handling material, coal material for additions and betterments, the Commission permits us to charge in our investment account up to seven mills per ton mile on our capital as part of the cost in bringing in. If it is applicable in determining the capital investment it is certainly equal, if not more applicable in determining the cost of performing a specific service. So far as he would include the cost of transporting material as revenue, we would not include it in our revenue account as earnings. We would charge it to the expenses of Florida and credit the expense to the

other lines. It wouldn't be an item of revenue. It would be offset expense. We would debit the Florida line. We would take it out of one pocket and put it in another only to accurately determine what the cost was in one pocket.

In my exhibit No. 4, the figures which I show in the Column, Operating ratio, System, are not figures deduced by the same method allocating expenses that I have used elsewhere in my other exhibits. I have not used those Florida figures. It is not a fact that I have used neither [fol. 1620] the figures in the Column headed operating ratio system, or the figures in the Column headed Oklahoma Formula in any of my subsequent exhibits. The significance of the comparison of the two is as I have pointed out, we have always felt that Florida had never been charged with a sufficient amount of expenses and in order to definitely determine whether or not we were overcharging or undercharging Florida we had the expenses assigned directly for the first six months of 1931, from January 1st to June 30th, which demonstrates conclusively that we have not charged Florida with sufficient amount of expenses. The operating ratio system was 69.02% for Florida and under the Oklahoma Formula 78.18%. Those fiures in that column means that is the expense assigned to Florida in our monthly report to the Florida Commission for the first six months in 1931 determined on using the operating ratio system on the revenue basis. That is, you take the operating basis for way and maintenance structure of the system and apply that percentage to the revenue for Florida. You really reverse it to be accurate. We find the relation of the operating revenue in Florida to the system and then we apply that percentage to each of the blocks of expense to produce the figures shown in the Column headed Operating Ratio System. It amounts to substantially the same thing.

Q. Now, on your exhibit No. 5 Mr. Lamb, is it correct to say that the grand total of amounts treated as so called haulage expenses shown on Column E, sheet 3 of Exhibit [fol. 1621] 5, as twenty-six million dollars plus, includes the haulage expenses, whatever they were for logs in Florida.

A. It includes expenses used in developing that which I used and I think that excludes possibly certain items that could be included in that. Somewhat proportionately in

that twenty-six million dollars are the expenses for hauling logs. (Page 385 of testimony.)

It is correct that if it is not in there it is somewhere in the amount thirty-six million dollars in Column C. When you come down to the sub-figures headed Out of Pocket Expenses, freight, it is correct to say that the out of pocket expenses for hauling logs are included in that entire total somewhere of $6,920,683.75 of out of pocket expense, freight, for the entire system. It is also included in the $36,308,812.74 in Column C. On my exhibit 6, the tax accounts there shown and the computation of return on investment there shown are all based on 1929. In this Florida tax, line 10, there is an item, Florida Outside Agency, $104.79. I cannot accurately say how that is determined. I think it is some offices that we have on which we pay a tax on the property. I cannot say how we allocate this particularly to Florida. It is taken from the report to the Commission. It is not necessary from arbitrary basis. It may be added in there and just classified as Outside Agency, but I cannot for the moment recall just what it would be. The amount is insignificant and couldn't affect it in any way in any event.

[fol. 1622] Q. Now, referring back again to your Exhibit No. 5, are there included in the amounts treated as the so-called haulage expenses, amounts which would continue to accrue as haulage expenses whether or not logs moved in Florida.

A. To a certain extent. That would be expenses in the nature of things expended for superintendence. I don't imagine if we stopped hauling log trains we would cut off a superintendent.

Q. If you stopped hauling log trains you would cut off the expense of handling perishable freight.

A. No more than we could stop the hauling of logs.

Q. In other words, there are millions of dollars of expenses, haulage and others, shown on this Exhibit 5, which go on and will go on regardless of log transportation.

A. It does not necessarily follow that they would all go on or that they would not. The possibility is that certain of the haulage expenses, if we cut off a log train, we could cut off the fuel and all the expenses of that particular train. There is necessarily a great deal of expense in there besides the expense of the log train.

Q. And most of that would go on regardless of what happened to the log train, would it not——

Objection by Mr. Alston.

—including a proportionate part of the hauling of fresh fruits and vegetables.

[fol. 1623] A. Now let me make that clear. Unquestionably, Mr. Gutheim has in mind the statement that it costs more to handle perishables than logs. That is true as a whole, but the principle expense or one of the largest expenses in handling perishables is getting it through the terminals, the extended movement through terminals, the switching of cars to be iced for perishables and placing of empties for perishables. Now, all of that expense is handled by the yard force and every dollar of that expense has been eliminated from my haulage cost in Column A, so that by the elimination of all of these yard accounts and these station employees accounts of $3,281,000 plus, I have eliminated from my haulage expenses those expenses which create the heavy expense of handling perishables and l. c. l. freight. The bulk of the l. c. l. freight is in your station employees and yard handling. I want to make it clear that all of that has been eliminated in Column A. On sheet 2, of this same exhibit No. 5 and on item 392, Train Enginemen, I show the expenses incident to the employment of train enginemen of $1,571,323.64, and that is all included in the so-called mileage expense. That includes the enginemen for trains hauling perishables just like it includes the wages of enginemen in branch lines and log trains. It includes the wages of enginemen of whatever train of whatever commodity over the road. Silk or satin, cotton, calico or rags. In my exhibit No. 170, I said that the figures in items one to eight were deducted from an exhibit that was made a matter of [fol. 1624] record by the Atlantic Coast Line in the last hearing before the Interstate Commerce Commission. In ascertaining in Item 9 that the out of pocket expenses per gross ton mile on my Exhibit 9-A is .0882888 cents. That is the cost on the third division of the Atlantic Coast Line developed from an actual analysis of the payrolls, vouchers and all issues on the third division as compared with the first and second division.

Yes, in other words, the first thing you have to ascertain to produce these figures on this unit cost is the out of pocket expenses on the third division. It is not a fact that

some of the out-of-pocket expenses are peculiar to the third division. They cover all over the system and to the extent that they do cover all over the system, I determined what portion of them is proper to be charged against the third division from the actual analysis of the vouchers, payrolls and issues for the year July 1st, 1928 to June 30th, 1929, covering what I have termed as out of pocket expenses. The accounts are listed on the third sheet of my Exhibit 5. In producing this figure you would not necessarily have original items of expenditure which would involve out of pocket expenses on the third division and on the other divisions because of this exception. You take out engines. Let us take the account train enginemen. Now, if that engine operates entirely in the third division there is no necessity for it as the operation would only be in the third division. There were some out of pocket expenses which were peculiar to the third division and in which no other division was interested and those were assigned directly. (P. 390 of testimony.)

[fol. 1625] We possibly have other out of pocket expenses which involve not only the third division but other divisions. The figures, as I explained before, were drawn from the actual vouchers and payrolls of the third division, that is, the division operating entirely in Florida and constituting 94% of the mileage within the State of Florida. For example, Account 392, Train Enginemen, the amounts chargeable were drawn from the payrolls which were definitely assigned to freight, passenger and mixed. For the month of September 1928 $7,149.38 was charged to mixed. This was distributed to passenger and freight on the basis of the percentage of car miles in mixed train, passenger and freight, which assigned 76.93% for freight. This figure was added to the direct freight expense to produce the amount chargeable to freight. Account 394, Fuel for Train Locomotives, vouchers were examined and from the distribution thereon, each voucher was set up showing the charge for freight, passenger, common or mixed. Payrolls were examined and the amount directly distributed thereon for freight, passenger, common and mixed, was set down. Shop expenses were distributed on the accepted basis as prescribed by the I. C. C. classification of accounts, being proportioned to the various accounts affected on the relative proportion which the total amount of charges to shop expenses bears to the total of the directly distributed labor.

Fuel account was analyzed and the amounts charged to freight, passenger, common and mixed ascertained, to which is added the store expenses distributed on the basis [fol.1626] of issues to the respective accounts. The amount chargeable to mixed was distributed on percentage of car miles and mixed trains, which amount charged to common was distributed to passenger and freight on direct assignment of all other charges. Account 397, water for train locomotives, is all charged to common and is distributed to passenger and freight on the basis of the distribution to passenger and freight of account 397 plus fuel for train locomotives. Account 398, lubricants for train locomotives was practically all directly assigned to freight and passenger from the vouchers, materials and supplies. The amount chargeable to mixed trains was apportioned on the basis of car miles in mixed trains, the amount charged common was apportioned on the basis of direct assignment to passenger and freight. Account 399, Other Supplies for Train locomotives, vouchers and payrolls were examined and the distribution to passenger, freight, common and mixed listed and a proportion of shop expenses added. As previously explained, the direct issues of materials and supplies assigned certain amounts to freight and passenger and smaller amounts to common and mixed. To each of these accounts a proportion of stock expenses was added and the amounts chargeable to mixed service apportioned as between passenger and freight on the basis of car miles in mixed trains and the amount charged to common was apportioned on the basis of direct assignment to passenger and freight. Account 400, Engine House Expenses, Road, vouchers were analyzed and the amounts set down separately for those chargeable to freight and passenger, com- [fol. 1627] mon and mixed. Payrolls were examined and the amounts charged thereon to the respective service were set down. The figures as distributed direct from the payrolls were originally distributed as between freight, passenger and mixed on the basis of engines handled in and out for the respective services. A proportion of shop expenses were added as prescribed by the classification of operating expenses. Materials and supplies and issues as directly charged to freight, passenger and common were set down and to each of these classes of service was added a proportion of stock expenses on the basis of issues. Bills collectible as representing services rendered other com-

panies were credited to common and the net amount of the common expenses assigned to freight and passenger on the basis of direct assignments to these respective services.

Account 401, Trainmen, Road, charges to this account were drawn direct to the payrolls where absolute distribution is made to freight, passenger and mixed. The amount charged to mixed was assigned to freight and passenger on the basis of car miles handled in mixed trains.

Account 402, Train Supplies and Expenses, vouchers and payrolls were examined and charges set out to freight, passenger, common and mixed. Payrolls were also examined and the amount charged to freight, passenger and mixed, accumulated and proportion of shop expenses were added. Issues for materials and supplies direct to the freight and passenger service and common were accumulated and store expenses added. Bills collectible as representing supplies [fol. 1628] furnished other roads were credited directly to the respective accounts. The expenses chargeable to mixed service were distributed on the basis of car miles in mixed trains and common expenses on direct assignment. This procedure was followed for each of the months from July 1st, 1928, to June 30th, 1929, inclusive and totals chargeable to each account accumulated. This procedure that I have outlined in detail was followed with respect to the payroll disbursements but not with respect also to the direct disbursements of materials and supplies that were paid for and used immediately, nor for materials and supplies that went into stock and covered by our issue tickets. It is true that the expenses I thus divided were the out of pocket expenses including everything incident to the movement of all the traffic on the third division. Having ascertained the total third division out of pocket expenses, in that way I proceeded to reduce it to the unit basis of per gross ton miles by dividing the total expenses accrued by the gross ton miles handled or hauled. I got the total gross ton mile from my record, the car accountant's record. I personally made the calculations to get at this result. No, I didn't make the individual calculations on the individual payroll disbursements. That was done under my personal supervision by our distributing officer. I personally worked it with the assistance of our auditor of disbursements and with the clerks. Yes, we have an auditor of disbursements [fol. 1629] in our organization. I personally supervised this work.

Q. Now, on this same exhibit 7, in item 15, you charge a return on investment of five and three-quarters per cent. Did the Atlantic Coast Line earn a return of five and three quarters per cent on its investment in 1929? (P. 395 of testimony.)

A. Whether we earned it or not, we were entitled to earn it. No, we did not earn it but we are entitled to have earned at least five and three quarters per cent in 1929. It earned 4.2%. That was 4.2% on our investment account. That was for the entire system. On our investment account in the State of Florida in 1929 we earned 2.43%. However, we are entitled to earn more. In 1930 in Florida we earned 1.17%. In this last proceeding before the Interstate Commerce Commission I presented calculations similar to the ones shown on my Exhibit 7 and also on 8 and the others, I did not obtain the same results because I erroneously used the wrong expansion factor at the bottom of the page. No, my evidence before the Interstate Commerce Commission proceeding *were* not originally on the exhibit here. My final statement was that these percentages should be used. They were the percentages originally shown on my exhibit and they were erroneously changed and I stated at a later hearing how these were the correct percentages. On this Exhibit 7, the entry of 81.36 includes all of the log traffic in Florida for whatever the period was. I believe I heard Mr. Perrin testify that there would be more return locally for the single carload business than for the trainload business. On these calculations in Exhibit 7, I have shown in item 3, billing weight which is the actual log transportation and the train weight going with the logs [fol. 1630] and the tare weight on the empty haul. I have not shown anything to indicate the load that might have come on the empty car and the revenue earned on that load in not hauling logs. I think we can very safely assume that 100% return.

Q. Mr. Perrin didn't so assume and I am trying to get it whether that is the return empty movement to differentiate the car load business from the trainload business and why don't you credit this account with revenue earnings?

A. I don't know that I understood what Mr. Perrin had in mind. I believe he said that the opportunities were greater for loading.

Q. I understood that Mr. Perrin was very definitely endeavoring to let the record show that the economy of train-

load business was not as great relatively as we contend it was.

A. The record will show what he testified to.

Q. Mr. Lamb, as a man experienced in accounting, are you prepared to say that there are numerous formulas that have been used by other accountants to produce transportation cost for the haul?

A. For particular commodities?

Q. Yes.

A. I have never seen one that would stand the test of an absolute cost but in this case, as I stated on my direct examination, these figures in Column A are not supposed to be the absolute cost because I said it was impossible to determine the actual cost. They understate the cost and the real cost lies about between line- A and B. I am unable to state the exact figures.

[fol. 1631] I have never seen any accountant who could produce the absolute cost. There are many formuli used by different accountants, but I have never seen one that would produce the actual cost. The Interstate Commerce Commission has had supervision over accounts of railroads since 1888 and more specifically and in greater detail since 1926. The Interstate Commerce Commission has personal classification of accounts and methods of subdividing expenses between freight and passenger. That is the basis I have used in determining the freight and passenger expenses used on my exhibits. To my knowledge the Interstate Commerce Commission has never prescribed a formula for ascertaining the cost of transportation in particular movements nor the cost of transporting a particular commodity over any particular haul.

By Mr. Adair:

My Exhibit 23 shows the movement of a log shuttle train between Hines and Palatka for the Wilson Cypress Company for the month of November, 1930.

In those movements during that month there were 490 cars loaded with logs and 25 trains. The trains made 13 trips loaded and 12 empty. The total net weight of those [fol. 1632] loaded log trains was 15,680 tons, net tons, 2,000 pounds each. The Cummer Scale was reduced to cents per pound is 3.2 cents from Hines to Palatka, according to Mr.

Perrin's Exhibit 11 in I. C. C. document 18364. (Page 400 of testimony.)

Based on that rate the gross revenue received out of that log train movement for the loaded cars and logs during that month of November 1930 was $10,035.20. At the bottom of this exhibit the out of pocket expenses total $2,398.55. Deducting only the out of pocket expenses from that gross revenue on that log shuttle movement there would be $7,637.65. I made up that statement and that includes also the cost of transporting twelve of these trains back to Palatka from Hines.

I have charged in ascertaining the cost per gross ton mile other empty cars transported to other places. I have included in the total gross ton mile the ton miles made by other than log trains on cars handled in that train. There were seven loaded cars and 73 empty cars handled in that train.

[fol. 1633] The empties moved from Palatka to Newberry. I cannot say that they were not properly chargeable against the log traffic. They may have been. The 69 empties from Palatka to Newberry may have been empty cars coming back in connection with the log movement. There is a total of 498 cars handled altogether, loaded and 553 empties. Now, there should have been in connection with these, at least 490 empty cars and some of these 69 empty cars moving from Palatka to Newberry and Palatka to North Diamond may have been some moving in a previous period that had not been returned. It is evident they don't always return in the same period the same number of cars. There were eight loaded cars in the log trains going back loaded with other products, loaded with gravel, lumber, etc.

In so far as out of pocket expenses were concerned for the month of November 1930, the gross revenue exceeded the out of pocket expense by some $7,635.65 on the logs moving on the Hines-Palatka movement. That was the typical movement month in the movement of logs. In trying to get a typical month we took the total number of cars and found these 490 cars. I think the average month was 485 cars.

Yes, typical of the Palatka movement. There is no movement of logs from Hines to Palatka except that log train movement that I know of definitely.